AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on FEB 1 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6228. Agenda 82

Macy Adams,
Defendant in Error,
-vs-
Elgin and Belvidere Electric Co.,
Plaintiff in Error.

Error to the circuit court of Boone county.

NIEHAUS, P. J.

The plaintiff in error operates an interurban electric railway between Elgin and Belvidere; and its line crosses Warren Avenue, a public street in the city of Belvidere in a nearly easterly and westerly direction. On July 27, 1913, an electric passenger car of the plaintiff in error coming from the east, after entering the city of Belvidere, came into contact with the buggy of the defendant in error at the Warrem Avenue crossing. The defendant in error, with her daughter-in-law, Mrs. Miller, on the day in question, was riding in a top buggy driving a single horse, on Warren Avenue, going south, and had just reached the crossing when the buggy was struck, and the impact resulted in breaking one of the wheels of the buggy, smashing the top off the buggy over the occupants, and causing the horse to run away, whereby the defendant in error was injured; and she testifies that she was precipitated partly over the dashboard of the buggy, and one of her legs forced through the bottom of the buggy; that the horse ran away, and lying over the dashboard, bent forward with her head betwenn the whipple tree, her left leg through the bottom and her right leg over the box of the buggy, she hung onto the lines while the horse

Gen. No. 6222. Agenda 82

Mary Adams,
Defendant in Error,
-vs-
Elgin and Belvidere Electric Co.,
Plaintiff in Error.

Error to the circuit court of Boone county.

MIGHAUS, P. J.

The plaintiff in error operates an interurban electric railway between Elgin and Belvidere; and its lines crosses Warren Avenue, a public street in the city of Belvidere in a nearly easterly and westerly direction. On July 27, 1913, an electric passenger car of the plaintiff in error coming from the east, after entering the city of Belvidere, came into contact with the buggy of the defendant in error at the Warren Avenue crossing. The defendant in error, with her daughter-in-law, Mrs. Miller, on the day in question, was riding in a top buggy driving a single horse, on Warren Avenue, going south, and had just reached the crossing when the buggy was struck, and the impact resulted in breaking one of the wheels of the buggy, smashing the top off the buggy over the occupants, and causing the horse to run away, whereby the defendant in error was injured; and she testifies that she was precipitated partly over the dashboard of the buggy, and one of her legs forced through the bottom of the buggy; that the horse ran away, and lying over the dashboard, bent forward with her head between the shafts of the horse, her left leg through the bottom and her right leg over the box of the buggy, she hung onto the lines while the horse

was running away dragging the demolished buggy for about a block west, when the horse was stopped.

The defendant in error commenced this suit in the circuit court of Boone county to recover damages for the injuries alleged to have been sustained by her. The declaration filed contains two counts. The negligence charged in the first count against the plaintiff in error is a failure to give a sufficient warning of the approach of its interurban car by ringing a bell or sounding a whistle; and in addition thereto in the second count it is alleged that the car approached the crossing at a hight and dangerous rate of speed. To these charges in the declaration the plaintiff in error filed the general issue upon which the case proceeded to a trial by jury. The jury found the plaintiff in error guilty and assessed the damages of the defendant in error at $2,000; whereupon a motion for a new trial was made, which was disallowed by the court, and a judgment rendred upon the verdict, and from this judgment a writ of error is prosecuted.

A number of matters are assigned as error; but the principal questions raised are, that the evidence is insufficient to support the verdict; that the evidence does not show the negligence charged in the declaration; and that it proves that the defendant in error was guilty of contributory negligence; also that the court erred in its rulings on instructions; and that the damages are excessive.

According to the testimony adduced on the part of the plaintiff in error she and her companion, Mrs.Miller, who was her daughter-in-law, were riding along on Warren Avenue in the buggy, which had the side curtains and back curtains up. She was driving a single horse at a slow trot toward the crossing in

was running away dragging the demolished buggy for about a block west, when the horse was stopped.

The defendant in error commenced this suit in the circuit court of Boone county to recover damages for the injuries alleged to have been sustained by her. The declaration filed contains two counts. The negligence charged in the first count against the plaintiff in error is failure to give a sufficient warning of the approach of the interurban car by ringing a bell or sounding a whistle; and in addition thereto in the second count it is alleged that the car approached the crossing at a high and dangerous rate of speed. To the charges in the declaration the plaintiff in error filed the general issue upon which the case proceeded to a trial by jury. The jury found the plaintiff in error guilty and assessed the damages of the defendant in error at $2,000; whereupon a motion for a new trial was made, which was disallowed by the court, and a judgment rendered upon the verdict, and from this judgment a writ of error is prosecuted.

A number of matters are assigned as error; but the principal questions raised are, that the evidence is insufficient to support the verdict; that the evidence does not show the negligence charged in the declaration; and that it proves that the defendant in error was guilty of contributory negligence; and that the court erred in its rulings on instructions; and that the damages are excessive.

According to the testimony adduced in behalf of the plaintiff in error she and her companion, Mrs. [illegible], who was her daughter-in-law, were driving along on Warren Avenue in the buggy, which had the side curtains and back curtains on. She was driving a single horse at a slow trot toward the crossing in

question. When they got to the Moon place, which is on the east side of Warren Avenue, about 150 feet from the crossing, both she and her companion looked and listened for an approaching car, and kept looking almost continuously toward the interurban track, but that their view toward the track, which was to the southeast, was greatly interfered with, and sometimes totally cut off by certain intervening obstructions, some of which were on the Vail place, which was situated toward the east and next to the right of way of plaintiff in error, and on this place there were buildings a dwelling house and barns and out-houses and large trees covered with foliage, and with limbs reaching within seven feet of the ground, as well as a number of small fruit trees, about six or seven feet in height, and on the right of way there was a fence running along the northerly side toward the east, which was four and a half feet high, and covered with morning glories, and on the right of way there wer also high weeds and sun flowers and underbrush, and in the midst of the weeds and underbrush there was also a small bushy tree, all interfering with the view of defendant in error toward the interurvan track, in the direction from which the car in question was approaching. And the defendant in error and her companion, Mrs.Miller, testify that although they were on the alert and tried to ascertain the appraoh of any interurban car by looking and listening, they did not hear any warning nor see any approaching car until they were almost on the track; that defendant in error, after hving looked toward the east for a car and not noticing any, turned just before getting to the crossing to the west and looked in that direction for a car, and as she turned back to again look to the east she saw it coming and heard three sharp blasts of the

question. When they got to the moon lake, which is on the east side of Warren Avenue, about 100 feet from the crossing, both she and her companion looked and listened for an approaching car, and kept looking almost continuously toward the interurban track, but that their view toward the track, which was to the southeast, was greatly interfered with, and sometimes totally cut off by certain intervening obstructions, some of which were on the Vail place, which was situated toward the east and next to the right of way of plaintiff in error, and on this place there were buildings a dwelling house and barns and out-houses and large trees covered with foliage, and with limbs reaching within seven feet of the ground, as well as a number of small fruit trees, about six or seven feet in height, and on the right of way there was a fence running along the northerly side toward the east, which was four and a half feet high, and covered with morning glories, and on the east of way there were also high weeds and sun flowers and underbrush, and in the midst of the weeds and underbrush there was a large, bushy tree, all interfering with the view of a person in a car toward the interurban track, in the direction from which the car in question was approaching. And the [illegible] in [illegible] panion, [illegible], testify that [illegible] they [illegible] and tried to ascertain the approach of any interurban car, looking and listening, they did not see any, nor hear any, [illegible] car until they were [illegible] on the track; [illegible] car, after having looked toward the east [illegible] not [illegible], turned just before getting to the [illegible] to [illegible] in that direction [illegible], and [illegible] turned [illegible] to the east [illegible] no [illegible]

whistle. The car at the moment she saw it was almost on the east line of the crossing running at a high rate of speed, and her horse had stepped over the nearest rail; that she immediately pulled the horse around to the right and that the horse quickly turned to the right, and thereby cleared the swiftly approaching car; but that the car nevertheless struck the buggy with the result before stated.

Mrs.Miller, who was with the defendant in error, in the buggy, corroborates her upon all material points, and other witnesses corroborate the defendant in error in some of the details related by her with reference to the manner in which she approached the crossing, and concerning the obstructions which interfered with her view, as to the speed of the car and as to the time when the whistle sounded. The testimony of the defendant in error and her companion, however, are directly in conflict with that of the motorman and the conductor who had charge of the running of the car; other witnesses also testified for the plaintiff in error andin contradiction of the testimony of the defendant in error.

To determine the question of the weight of the evidence it was necessary to pass upon the credibility of the various witnesses Counsel for plaintiff in error strongly contends that the witnesses who testified for the plaintiff in error were more worthy of belief than the witnesses for the defendant in error, and that these witnesses really furnished the only reliable evidence in the case and that their testimony should havecontrolled the jury in arriving at a verdict; and that since it did not so impress the jury it should so impress this court, and that taking the testimony of the witnesses for the plaintiff in error as presenting the facts in the case the verdict is clearly against the weight of the evidence.

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Mrs. Miller, who was with the defendant in error, in the buggy, corroborates her upon all material points, and other witnesses corroborate the defendant in error in some of the details related by her with reference to the manner in which she approached the crossing, and concerning the obstructions which interfered with her view, as to the speed of the car and as to the time when the whistle sounded. The testimony of the defendant in error and her companion, however, are directly in conflict with that of the motorman and the conductor who had charge of the running of the car; other witnesses also testified for the plaintiff in error making contradiction of the testimony of the women but in error.

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It is a well settled rule, however, the wisdom of which has been repeatedly emphasized by courts of review, that a jury which sees and hears the witnesses is in a better position to pass upon their credibility than a court which feviews only the record; and it is for that reason that it has been considered the acknowledged province of the jury to determine questions of fact which depend on the credibility of witnesses where there is a conflict in the evidence. The jury in this case determined the conflict in the evidence in favor of the defendant in error, and must have done so by believing the testimony of certain witnesses, and we, as a court of review, would not be warranted in saying that they should have accepted the testimony of other witnesses as representing greater or clearer elements of verity. C.C. R. Co. v Bork, 128 Ill. App. 357; 117 Ill.App.315.

Whether or not the employes of the plaintiff in error in charge of the car in question were guilty of the negligence charged in the declaration;whether or not they gave the defendant inerror proper and sufficient warning of the approach of the car before it reached the crossing; and whether or not the car was runing at a high and dangerous rate of speed in approaching the crossing, considering the conditions that prevailed there, as well as whether or not the defendant in error exercised the care and caution for her safety which a reasonably prudent person would have exercised under similar conditions and circumstances, to avoid injury, were all purely questions of fact for the jury to determine, and the jury having determined them this court would not be justified in saying that they should have been determined differently unless the verdict was manifestly against the weight of the evidence, which we are not warranted in holding for the reasons before stated.

It is a well settled rule, however, the wisdom of which has been repeatedly emphasized by courts of review, that a jury which sees and hears the witnesses is in a better position to pass upon their credibility than a court which reviews only the record; and it is for that reason that it has been considered the acknowledged province of the jury to determine questions of fact which depend on the credibility of witnesses where there is a conflict in the evidence. The jury in this case determined the conflict in the evidence in favor of the defendant in error, and must have done so by believing the testimony of certain witnesses, and we, as a court of review, would not be warranted in saying that they should have accepted the testimony of other witnesses as representing greater or clearer elements of verity. C.C. R. Co. v Bory, 128 Ill. App. 387; 117 Ill.App.318.

Whether or not the employes of the plaintiff in error in charge of the car in question were guilty of the negligence charged in the declaration;whether or not they gave the defendant in error proper and sufficient warning of the approach of the car before it reached the crossing; and whether or not the car was running at a high and dangerous rate of speed in approaching the crossing, considering the conditions that prevailed there, as well as whether or not the defendant in error exercised the care and caution for her safety which a reasonably prudent person would have exercised under similar conditions and circumstances, to avoid injury, were all purely questions of fact for the jury to determine, and the jury having determined them the court would not be justified in saying that they should have been determined differently unless the verdict was manifestly against the weight of the evidence, which we are not warranted in holding for the reason hereinbefore stated.

Plaintiff in error contends that error was committed because some of the instructions which were requested on its behalf were refused. Refused instruction No. 1, which is pointed out, is as follows:- " It is not the exercise of ordinary care and prudence for a person to drive with a horse directly on to a railroad crossing, known to he at the time to be dangerous, without making an effort by stopping, or listening, or otherwise, to ascertain whether a car is approaching, or whether it is safe to drive on the track with a horse."

Plaintiff in error insists that because this instruction was held proper in the case of C.& N.R.Ry. Co. v Hatch, 79 Ill. 137, it was proper in this case and should have been given. It appears, howeverm that the particular facts constituting contributory negligence upon which the instructon was based in the Hatch case were different, and moreover, were undisputed. The alleged negligence in the Hatch case, as stated by the supreme court, "consisted of the running of a train composed of three or four cars and an engine, backwards against a one-horse wagon laden with stoves and cement, belonging to appellee, as it was crossing appellant's track in one of the streets of the city of Chicago. The teamster in charge of appellee's wagon knew that the corssing was dangerous and had been familiar with it for four or five years. **** There is also evidence that the teamster on first seeing the approaching train, and while out of danger, stopped his horse very suddenly throwing him back on his haunches, and then urged him forward across the track." Refrrring to the main fact of contributory negligence, the court says:- " He made no effort to ascertain whether there was danger, before passing onto the crossing; but directed his attention, as he says, to getting his horse up the

Plaintiff's error contends that error was committed because some of the instructions which were requested on its behalf were refused. Refused instruction No. 1, which is pointed out, is as follows:- " It is not the exercise of ordinary care and prudence for a person to drive with a horse directly on to a railroad crossing, known to be at the time to be dangerous, without making an effort by stopping, or listening, or otherwise, to ascertain whether a car is approaching, or whether it is safe to drive on the track with a horse."

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grade." It is apparent that in the Hatch case no effort was made by the plaintiff to ascertain whether there was danger from an approaching train or cars, before passing onto the crossing, and this was practically admitted, and could therefore properly be assumed in an instruction. But in this case whether or not the defendant in error made a proper effort to ascertainthe danger, was a matter in dispute, and about which there was a conflict in the evidence.

It is error for a court, in an instruction, to assume as true a fact which is in dispute. (I.C.R.R.Co. v. Zang, 10 Ill. App. 594;Merrill v.Corbin, 15 Ill.App. 81; City of Chicago v Edson, 43 Ill. App. 417; City of Chicago v Ripley, 84 Ill. 82; C.St.L.& D.R.R.Co. v Hutchinson, 120 Ill. 587; Mobile & O.R.R, Co., v Healy, 100 Ill.App. 586.) The instruction, therefore, was properly refused.

Appellant's refused instruction No, 2, is as follows:-

" If the evidence in this case shows that Mary Adams tookthe risk of crossing in front of the car before it could strike her, and in this was mistaken, that she miscalculated, and from any cause of her own was not able to pass safely in front, the plaintiff must bear the loss and the jury must find for the defendant."

This instruction was properly refused because there was no evidence in the case from which a reasonable inference might be drawn that the appellee crossed in front of a car, or took the risk of crossing in front of any car, or that she was struck because she attempted to cross in front of a car, and had miscalculated her ability to pass in safety, before it would strike her. Instructions which are n o t based upon evidence or upon what may be a reasonable inference from the evidence, are properly refused.

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Appellant's refused instruction No. 2, is as follows:-

" If the evidence in this case shows that Mary Adams took the risk of crossing in front of the car before it could strike her, and in this was mistaken, that she miscalculated, and from any cause of her own was not able to pass safely in front, the plaintiff must bear the loss and the jury must find for the defendant."

This instruction was properly refused because there was no evidence in the case from which a reasonable inference might be drawn that the appellee crossed in front of a car, or took the risk of crossing in front of any car, or that he was struck because she attempted to cross in front of a car, and from misjudging her ability to pass in safety, before it would strike her. Instructions which are not based upon evidence or upon what may be a reasonable inference from the evidence, are properly refused.

Plaintiff in error's refused instruction No. 5 is as follows: " The court instructs the jury that if you believe from the evidence in the case that the plaintiff had sufficient opportunity to hear the sounding of the whistle of the car in question, and that such whistle was sounded when the plaintiff was several rods north of the railroad track, then you should consider this case the same as though the plaintiff did hear the whistle and then and in spite of such warning rode along in the carriage until the carriage was struck by the car, and then plaintiff then was guilty of such contributory negligence as would prevent her from recovering in this case. And the jury are instructed that this is true even though you may believe from the evidence that the motorman while the car was approaching the crossingin question did not maintain a proper outlook, or that the car was approaching said crossing at a high rate of speed. The law is that if the plaintiff was guilty of any negligent act which caused or contributed to cause the collision, damage, or injury in question, then no matter whether the defendant or its employees were negligent or not, the plaintiff cannot recover."

It may be said concerning this instruction that we are not prepared to hold that a person about to drive across a railroad track, especially at a city crossing, who has opportunity to hear a whistle sounded as a warning of an approaching train, but does not in fact hear it, shall be charged with the same responsibility concerning it as if he had heard it. We are of opinion that the instruction was properly refused.

We cannot agree with plaintiff in error in its contention that error was committed because the 4th, 5th and 6th instructions given for defendant in error contain certain repetitions of state-

Plaintiff in error's refused instruction No. 5 is as follows:

"The court instructs the jury that if you believe from the evidence in the case that the plaintiff had sufficient opportunity to hear the sounding of the whistle of the car in question, and that such whistle was sounded when the plaintiff was several rods north of the railroad track, then you should consider this case the same as though the plaintiff did hear the whistle and then and in spite of such warning rode along in the carriage until the carriage was struck by the car, and then plaintiff then was guilty of such contributory negligence as would prevent her from recovering in this case. And the jury are instructed that this is true even though you may believe from the evidence that the motorman while the car was approaching the crossing question did not maintain a proper outlook, or that the car was approaching said crossing at a high rate of speed. The law is that if the plaintiff was guilty of any negligent act which caused or contributed to cause the collision, damage, or injury in question, then no matter whether the defendant or its employees were negligent or not, the plaintiff cannot recover."

It may be said concerning this instruction that we are not prepared to hold that a person about to drive across a railroad track, especially at a city crossing, has a right to rely on hearing a whistle sounded as a warning of a train coming, but does not in fact hear it, shall be charged with the same responsibility concerning it as if he had heard it. We are of opinion that the instruction was properly refused.

We cannot agree with plaintiff in error in the contention that error was committed because the 4th, 5th, 6th instructions given for defendant in error contain certain expressions of white-

ments concerning the law and the respective rights and duties of a railroad company and a person crossing its tracks at a street crossing. These repetitions are not challenged as being erroneous, and it does not appear that repetitions of the law could have created in the minds of the jury an erroneous impression of the law, nor that the repetitions could have prejudiced the rights of plaintiff in error in any way.

It is also contended that the 5th instruction given for the defendant in error assumed that there was brush on the right of way of plaintiff in error, and that there is no evidence whatever that there was any brush on the right of way. In reference to this criticism of the instruction it is sufficient to say that there is evidence in the record that there was brush on the right of way, or what would reasonably come within the meaning of that term.

The instructions given state the law governing the case with substantial correctness upon all the points involved, and no error is apparent either in the giving or the refusal of the instructions. What we have said concerning the finding of the jury upon the main issues in the case applies with equal force to the contention of the plaintiff in error that the damages fixed in the verdict are excessive. If the defendant in error's statement as to the extent of her injuries, the pain and suffering connected therewith, and her inability to do the work she formerly did in consequence thereof, was truthful, the damages assessed by the jury are not excessive. It is evident that the jury came to the conclusion that the injuries of the defendant in error were real, and not feigned, and we cannot say that they were not justified in reaching this conclusion.

The judgment is affirmed.

Affirmed.

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It is also contended that the 5th instruction given for the defendant in error assumed that there was drawn on the right of way of plaintiff in error, and that there is no evidence whatever that there was any crash on the right of way. In reference to this criticism of the instruction it is not relevant to say that there is evidence in the record that there was crash on the right of way, or what would reasonably come within the meaning of that term.

The instructions given state the law governing the case with substantial correctness upon all the points involved, and no error is apparent either in the giving or the refusal of the instructions. What we have said concerning the finding of the jury upon the main issues in the case applies with equal force to the contention of the plaintiff in error that the damages fixed in the verdict are excessive. If the defendant in error's car was at fault to the extent of her injuries, the pain and suffering occasioned therewith, and her inability to do the work she formerly did in connection therewith, was truthful, the damages assessed by the jury are not excessive. It is evident that the jury came to the conclusion on the facts that the injuries of the defendant in error were real, and not feigned, and we cannot say that they were not justified in reaching that conclusion.

The judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

SEP 1 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6266. Agenda 26.

Anna Weiderhold, Edith Gerber, Christina Schumacher, Emma Kurfiss, Alfred Kurfiss, Charles Kurfiss, Matilda Speer, Harold Kurfiss, Eva Kurfiss and Zelma Kurfiss, (Complainants) Appellees,	)	
vs.	:	Appeal from the City Court of Sterling.
George Mathis, Appellant, (William Meyer, Lena Meyer, Carrie Lehman, Daniel Lehman, William Vetter, Lena Vetter, Louisa Eshelman, Aaron Eshelman, Michael Vetter and Fredericka Kurfiss, Defendants.)	)	

Niehaus, P. J.

This is a bill in equity for an accounting filed by the appellees, Anna Weiderhold and others, who are heirs of the body of John Kurfiss, deceased, in the City Court of the City of Sterling, against the appellant, George Mathis, as Trustee, and the heirs at law of Gottlieb Vetter, deceased. The bill alleges that John Kurfiss was one of the heirs of Carl F. Kurfiss, deceased, and that by the terms of the last will of Carl F. Kurfiss, the share of John Kurfiss was devised to George Mathis, the appellant, as Trustee, to be held and invested by said Trustee for the benefit of said John Kurfiss; the interest accruing from said trust fund to be paid to him annually; and that by the terms of said last will the trust fund so created was to be divided at the death of John Kurfiss equally among the heirs of his body, who are the complainants. The bill further alleges that said will also provided that if a home could safely be secured by using the trust fund held by the appellant he

Gen. No. 6266. Agenda 26.

Anna Waldenfold, Edith Gerber, Christina Schumacher, Emma Kurtzes, Alfred Kurtzes, Charles Kurtzes, Matilda Speer, Harold Kurtzes, Eva Kurtzes and Selma Kurtzes, (Complainants) Appellees,	
vs.	: Appeal from the City Court of Sterling.
George Mathis, Appellant, (William Meyer, Lena Meyer, Carrie Lehman, Daniel Lehman, William Vetter, Lena Vetter, Louisa Kahelman, Aaron Kahelman, Michael Vetter and Fredericka Kurtzes, Defendants.)	

Mishana, P. J.

This is a bill in equity for an accounting filed by the appellees, Anna Waldenfold and others, who are heirs of the body of John Kurtzes, deceased, in the City Court of the City of Sterling, against the appellant, George Mathis, as Trustee, and the heirs at law of Gottlieb Vetter, deceased. The bill alleges that John Kurtzes was one of the heirs of Carl F. Kurtzes, deceased, and that by the terms of the last will of Carl F. Kurtzes, the share of John Kurtzes was devised to George Mathis, the appellant, Trustee, to be held and invested by the trustee for [illegible] ; the interest coming from said trust [illegible] annually; and that by the terms of [illegible] created was to be distributed [illegible] among the heirs of his body. [illegible] further alleged the said will [illegible] provided [illegible] safely be secured by [illegible] trust and [illegible]

might invest the same in such home for said John Kurfiss, if such home could be procured by means of such trust fund, so as to be entirely without incumbrance; and in that case such home should be deeded to said John Kurfiss, and the trust ended.

The appellees also charge in the bill that appellant never made any report of accounting as Trustee nor purchased such home for John Kurfiss so as to be free from incumbrance; but alleges that on August 13th 1907, the appellant entered into a contract with one Gottlieb Vetter, since deceased, for the purchase of a home for said John Kurfiss, and that on said contract there is a balance due of about $600. That appellant made John Kurfiss several payments, the amount of which is unknown to appellees; and it is alleged that although appellant knew how much was due from himself as Trustee to the heirs of the body of John Kurfiss, deceased, and how much he had paid to said Vetter on the contract for the purchase of a home, he neglected and refused to inform them concerning these matters.

The answer filed by appellant denies that he never had any accounting with John Kurfiss, deceased, and avers that he did have such accounting, and that since the death of John Kurfiss he has offered to make account to the heirs of John Kurfiss, and also denies that he ever refused to give the appellees information in regard to his trusteeship; but avers, that he is and at all times has been ready and willing to pay to the heirs of Gottlieb Vetter the balance due them on said contract; and to pay such money as may remain payable to the heirs of John Kurfiss upon an accounting.

The case was referred to the Master, who made a report of the evidence and his findings, and upon this report the court entered a decree, finding that George Mathis, the appellant, received as Trustee for John Kurfiss, the sum of $2242.52, which with interest to June 1st 1915, at 5% made a total of $3162.42; that Mathis never

might invest the same in such home for said John Kurtiss, if such home could be procured by means of such trust fund, so as to be entirely without incumbrance; and in that case such home should be deeded to said John Kurtiss, and the trust ended.

The appellees also charge in the bill that appellant never made any report of accounting as Trustee nor purchased such home for John Kurtiss so as to be free from incumbrance; but alleges that on August 13th 1907, the appellant entered into a contract with one Gottlieb Vetter, since deceased, for the purchase of a home for said John Kurtiss, and that on said contract there was a balance due of about $600. That appellant made John Kurtiss several payments, the amount of which is unknown to appellees; and it is alleged that although appellant knew how much was due from himself as Trustee to the heirs of the body of John Kurtiss, deceased, and how much he had paid to said Vetter on the contract for the purchase [illegible], he neglected and refused to inform them concerning the [illegible].

The answer filed by appellant admits that he never [illegible] any accounting with John Kurtiss, deceased, [illegible] that he had [illegible] such accounting, and that since the death of John Kurtiss he [illegible] offered to make account to the heirs of John Kurtiss, [illegible] denies that he ever refused to give the [illegible] information [illegible] to his trusteeship; but avers, that [illegible] he has been ready and willing to pay to the heirs of Gottlieb Vetter the balance due thereon on said contract; [illegible] to pay such [illegible] payable to the heirs of John Kurtiss upon [illegible].

The [illegible] was referred to the master, [illegible] the evidence and his findings, [illegible] report [illegible] entered a decree, finding that Jacob [illegible], the [illegible], [illegible] Trustee for John Kurtiss, the sum of $2242.82, [illegible] interest to June 1st 1915, at 5% [illegible] total of $2[illegible]; [illegible]

made any report as Trustee, and never had made any accounting, and that he had failed and neglected to account to the heirs of John Kurfiss; that appellant, as Trustee for John Kurfiss, entered into a contract for the purpose of a home for said John Kurfiss, at Sterling, Illinois, with Gottlieb Vetter, since deceased, and that there was due on said contract on June 1st 1915, a balance of $556.15 to the heirs of Gottlieb Vetter, deceased; and that there was due from said appellant, as Trustee, a balance of $975. which sum, howver, included the balance stated to be due to the heirs of Gottlieb Vetter; and the court ordered payment of said amount of $975 into court, with interest thereon at 5% per annum until paid; the decree also allows the appellant $50 as compensation for his services as Trustee, and orders the costs of the suit to be charged against the trust fund.

An appeal was prayed from the decree, by the appellant, and the case is brought to this court for review upon two assignments of error, namely: That the court refused to allow $150 instead of $50 as compensation for the services of the appellant as Trustee, and that the court erred in refusing to allow appellant as credits upon his account as Trustee certain notes given by John Kurfiss to appellant amounting to the sum of $419.70, and interest thereon from February 1st 1907. In addition to these errors the appellees have assigned the following cross errors, namely: That the court erred in allowing appellant $100 for the money paid to Louisa Heffler, and erroed in ordering the costs of the case to be borne by the appellees and charged against the trust fund, and erred in allowing appellant $50 compensation for his services as Trustee.

made any report as Trustee, and never had made any accounting, and that he had failed and neglected to account to the heirs of John Murfies; that appellant, as Trustee for John Murfies, entered into a contract for the purpose of a home for said John Murfies, at Sterling, Illinois, with Gottlieb Vetter, since deceased, and that there was due on said contract on June 1st 1915, a balance of $556.15 to the heirs of Gottlieb Vetter, deceased; and that there was due from said appellant, as Trustee, a balance of $275. which sum, however, included the balance stated to be due to the heirs of Gottlieb Vetter; and the court ordered payment of said amount of $275 into court, with interest thereon at 5% per annum until paid; the decree also allows the appellant $50 as compensation for his services as Trustee, and orders the costs of the suit to be charged against the trust fund.

An appeal was prayed from the decree, by the appellant, and the case is brought to this court for review upon two assignments of error, namely: That the court refused to allow $150 instead of $50 as compensation for the services of the appellant as Trustee, and that the court erred in refusing to allow appellant an credits upon his account as Trustee certain notes given by John Murfies to appellant amounting to the sum of $419.70, and interest thereon from Feb. 1st 1907. In addition to these errors the appellee have assigned the following cross errors, namely: That the court erred in allowing appellant $100 for the money paid to Louisa Wolfer, and erred in ordering the costs of the case to be borne by the appellee, and observed against the trust fund, and erred in allowing appellant compensation for his services as Trustee.

The evidence shows that the appellant acted as Trustee by virtue of a clause in the codicil to the will of Carl F. Kurfiss, deceased, which designated him to take charge of the share which John Kurfiss was to receive from the estate of the testator; which clause is as follows: " Said share of my estate which should go to my son, John Kurfiss, I hereby devise and bequeath to my friend George Mathis, to have and to hold in trust for my son John Kurfiss, to be held and invested for his benedit, and the inter st of said share of money shall be paid to him annually during his life, said share of money to be paid share and share alike to the heirs of his body, when dead. It is, however, my will, that whenever a home can be safely secured by using this money, said Trustee shall so invest the fund held in trust by him ; provided said home can be secured so as to be entirely without incumbrance, in which case said home shall be deeded to my son John Kurfiss, and thus end the trust."

According to the reports of the executors of the estateof Carl F.Kurfiss, it appears that the appellant, as Trustee, received for John Kurfiss the following sums: February 1, 1906, $516.66; May 1, 1906, $1233.33; November 4, 1918, $592.53, making a total of $2342.52. The Master in his report deducted $100 from the amount received, which had been paid to Louisa Heffler, one of the devisees of the testator, by direction of the will. The appellant was one of the executors of the will of Carl F.Kurfiss as well as Trustee for John Kurfiss. The will provides that "the sum of $190.00 shall be deducted from the share of my son, John Kurfiss, and shall be paid to my daughter Louisa Hoefler." The $100.00 item had been paid to Louisa Hoefler under this provision of the will, and should have been

The evidence shows that the appellant acted as Trustee by virtue of a clause in the codicil to the will of Carl . Kurtzes, deceased, which designated him to take charge of the share which John Kurtzes was to receive from the estate of the testator; which clause is as follows: " Said share of my estate which should go to my son, John Kurtzes, I hereby devise and bequeath to my friend Jerome Mathis, to have and to hold in trust for my son John Kurtzes, to be held and invested for his benefit, and the interest of said share of money shall be paid to him annually during his life, said share of money to be paid share and share alike to the heirs of his body, when dead. It is, however, my will, that whenever a home can be safely secured by using this money, said Trustee shall so invest the fund held in trust by him ; provided said home can be secured so as to be entirely without incumbrance, in which case said home shall be deeded to my son John Kurtzes, and thus end the trust."

According to the reports of the executors of the est tof Carl F.Kurtzes, it appears that the appellant, as Trustee, received for John Kurtzes the following sums: February 1, 1906, $[illegible]; May 1, 1906, $1230.35; November 4, 1912, $[illegible]; [illegible] or $2242.52. The master in his report [illegible] $100 [illegible] the amount received, which had been paid to Louisa [illegible] for, [illegible] vouchers of the testator, by direction of the [illegible]. The [illegible] the executors of the will of Carl [illegible] Trustee for John Kurtzes. The will provides [illegible] "the sum of [illegible] will be deducted from the share of my son, John Kurtzes, [illegible] to my daughter Louisa Hoefler." The $100.00 [illegible] paid to Louisa Hoefler under this provision of the will, [illegible] been

deducted from the $516.66 which the report of the executors shows was paid to appellant as Trustee, on February 1st 1906; the appellant really received $416.66 as Trustee, and not $516.66. The Master made the correction, and we think it was properly made.

The duties which devolved on the appellant, as Trustee, by the terms of the will were to invest the trust fund for the benefit of John Kurfiss, ~~which~~ so that it would produce interest and to pay the interest which was thereby produced, annually, to John Kurfiss, and there is a direction in the will that if a home could be safely secured for John Kurfiss by using the trust fund for that purpose that then the Trustee was to invest the fund in such home; if such home could be secured with the trust fund so as to be entirely without incumbrance, and the home was to be deeded to John Kurfiss, and the trust then ended.

The evidence shows that the trust fund was invested by appellant by making various loans and the loans so made produced a reasonable interest. It is not material at this time except on the question of compensation of the trustee, to consider the question whether the loans so made were properly safe-guarded by security, inasmuch as there is nothing in the record to indicate that any part of the funds loaned out was lost or diminished thereby.

In order to simplify the proof as to the amount of this accrued interest and for greater certainty in the matter of accounting, it was stipulated by the parties that the appellant should be chargeable with interest on the trust funds that came to his hands at the rate of 5% per annum from the date of their receipt, and that he should be allowed interest at the rate of 5% per annum on all moneys paid out by him, by check, money order or otherwise on account of his trusteeship, said interest to be computed from the respective dates of said payments made by him. The court found the amount of this interest

deducted from the $816.66 which the report of the executors shows was paid to appellant as Trustee, on February 1st 1906; the appellant really received $416.66 as Trustee, and not $816.66. The Master made the correction, and we think it was properly made.

The duties which devolved on the appellant, as Trustee, by the terms of the will were to invest the trust fund for the benefit of John Kurtiss, ~~xxxxxxxxxxxx~~ so that it would produce interest and to pay the interest which was thereby produced, annually, to John Kurtiss, and there is a direction in the will that if a home could be safely secured for John Kurtiss by using the trust fund for that purpose that then the Trustee was to invest the fund in such home; if such home could be secured with the trust fund so as to be entirely without incumbrance, and the home was to be deeded to John Kurtiss, and the trust then ended.

The evidence shows that the trust fund was invested by appellant by making various loans and the loans so made produced a reasonable interest. It is not material at this time except on the question of compensation of the trustee, to consider the question whether the loans so made were properly secured by security, inasmuch as there is nothing in the record to indicate [illegible] any part of the funds loaned out was lost or diminished thereby.

In order to simplify the proof as to the [illegible] interest and for greater certainty in the [illegible] it was stipulated by the parties that the [illegible] with interest on the trust funds that [illegible] 5% per annum from the date of their receipt, [illegible] allowed interest at the rate of 6% per annum on [illegible] by him, by check, money order or [illegible] ship, said int rest to be computed [illegible] payments made by him. The court [illegible] this interest

to June 1st,1915, to be $919.90.

The appellant also sought to carry into effect the provision in the will concerning the procuring of a home for John Kurfiss, and it is apparent from the evidence that what he did in reference to this feature of the trust was done in good faith, and believing that he was properly carrying into effect the provisions of the will. He made a written contract on the 13th day of August, 1907, as Trustee, with Gottlieb Vetter, for the purchase of this home. The purchase price agreed upon was $1500, $300 of which was paid in cash at the time of making the contract, and it was agreed in the contract that $275 was to be paid on October 15, 1907; the balance of the purchase price could be paid at any interest paying time, but was to become due and payable six months after the death of Gottlieb Vetter. It was stipulated in the contract that the contract should in effect become a warranty deed to said George Mathis upon the payment of the amount due thereon into any National Bank in Sterling, and the filing of a receipt showing payment, in the office of the Recorder of Deeds, in case the heirs of Gottlieb Vetter refused to execute a deed; and there is also a provision in the contract that as much money as might be needed for the maintenance of said Gottlieb Vetter, at any time, should be paid with reasonable promptness, and that the property was to be deeded to John Kurfiss or his heirs. The home thus secured was turned over to John Kurfiss and he and his family took possession of it and occupied it and enjoyed the use of it up to the time of the death of John Kurfiss; whereupon it passed into the possession and use of the appellees, as heirs.

to June 1st, 1919, to [illegible] 919.90.

The appellant [illegible] sought to c[illegible] try into effect the revolution in the will concerning the proceeding at home for John Martin, and it is [illegible] from the evidence th[illegible] what be di[illegible] in reference to this [illegible] of the trust was done in good faith, and believing that to was properly carrying into effect t[illegible] provision of the will. [illegible] a written contract on the 12th day of August, 1907, [illegible] Gottlieb Vetter, for the purchase of this farm. The purchase price agreed upon was $1800, $500 of which was [illegible] in cash at the time of making the contract, and it was agreed in the contract that [illegible] to be paid on October 15, 1907; the balance of t[illegible] could be paid [illegible] interest [illegible], but [illegible] payable six months after the death of Gottlieb Vetter. It was stipulated in the contract that [illegible] warranty deed to [illegible] due thereon [illegible] Ry M. Lionel [illegible] receipt [illegible], in the [illegible] case the heirs of Gottlieb Vetter [illegible] there is [illegible] provision in the [illegible] be made for the [illegible] [illegible] to be [illegible] was turned [illegible] of it [illegible] death [illegible] of the [illegible].

The appellant paid the sum of $1052.25 from the trust fund on the home purchased, under the terms of the contract made with Gottlieb Vetter prior to the death of Vetter; he also turned over to John Kurfiss from the trust fund the amount of $450 to repair, remodel and improve this home, so as to make it more comfortable, and to better adapt it for use and enjoyment as a home. It is true that appellant did not carry into effect the provision of the will of Carl F. Kurfiss in regard to the purchase of such home exactly as contemplated by the testator. The idea of the testator no doubt was that the home to be urchased shall be one that would come within the purchasing power of the fund, and paid for at once, so as not to leave an unpaid balance which might encumber it. Nevertheless, there is not a direct inhibition in the will against the purchase of such home by the Trustee on partial payments. The amount stipulated to be paid for this home together with the amounts paid out for repairing and improving it, clearly came within the purchasing power of the trust fund, and the payment of all the money would have left the home without encumbrance, as the testator contemplated it should be. So that while the manner of procuring the home for John Kurfiss was somewhat irregular, it was intended to be and would have resulted finally in practically complying with the directions given in the will. John Kurfiss in his lifetime and the appellees as heirs of his body, had the samem use and enjoyment of this home as if the same had been purchased and paid for, in the exact manner contemplated by the testator as expressed in his will.

We are of opinion that the money expended for the home and for its repair, improvement and remodeling by the Trustee were proper charges against the corpus of the trust estate, and were properly deducted therefrom.

It is insisted by appellees that the appellant should have

The appellant paid the sum of $1082.25 from the trust fund on the home purchased, under the terms of the contract made with Gottlob Vetter prior to the death of Vetter; he also turned over to John Murfies from the trust fund the amount of $450 to repair, remodel and improve this home, so as to make it more comfortable, and to better adapt it for use and enjoyment as a home. It is true that appellant did not carry into effect the provision of the will of Carl F. Murfies in regard to the purchase of such home exactly as contemplated by the testator. The idea of the testator no doubt was that the home to be purchased shall be one that would come within the purchasing power of the fund, and paid for at once, so as not to leave an unpaid balance which might encumber it. Nevertheless, there is not a direct inhibition in the will against the purchase of such home by the Trustee on partial payments. The amount stipulated to be paid for this home together with the amounts paid out for repairing and improving it, clearly came within the purchasing power of the trust fund, [illegible] amount of all the money would have left the home without encumbrance, [illegible] the testator contemplated it should be. So that while the [illegible] purchasing the home for John Murfies was somewhat irregular, it was [illegible] to be and would have resulted finally in practically complying [illegible] directions given in the will. John Murfies in his [illegible] appellees as heirs of his body, and the [illegible] this home as if the same had been purchased [illegible] manner contemplated by the testator [illegible]

We are of opinion that [illegible] for its repair, improvement [illegible] charges against [illegible] deducted therefrom.

It is insisted by appellees [illegible]

made an accounting as Trustee, to them, as heirs of the body of John Kurfiss, immediately after the death of John Kurfiss, but it appears that three of these heirs were minors, and under these circumstances no personal settlement of the matters in controversy could have been made which would have been binding upon all. If the adult heirs had decided to enforce a settlement or accounting they should have had a guardian appointed for the minors; and appellant cannot legally be regarded in default because a settlement and accounting with the persons interested was not made.

We are of opinion that the amount of the notes and interest thereon which were held by the appellant against John Kurfiss and which he had given to appellant for the groceries and provisions and family necessaries with which the Trustee had provided him, are a proper charge against the accumulated interest which accrued on the fund, up to the time of the death of John Kurfiss, These groceries, provisions and family necessaries were really furnished to John Kurfiss, in lieu of payments of interest, and because they were furnished no doubt accounts for the fact that John Kurfiss did not demand nor receive the interest which was accumulating on the trust fund. Equitably, therefore, the Trustee should have the right to apply this interest in liquidation of the debt which was really incurred with reference to its payment out of this interest.

But there is another reason why equity would require the application of this interest to the payment of the notes in question. The interest which had accumulated in the hands of the Trustee at the time of the death of John Kurfiss, the Trustee was holding for John Kurfiss; it was the property of John Kurfiss and at the time of his death it passed to the appellees as his heirs at law, and not as heirs

made an accounting as Trustee, to them, as heirs of the body of John Kurtles, immediately after the death of John Kurtles, but it appears that three of the heirs were minors, and under these circumstances no personal settlement of the matters in controversy could have been made which would have been binding upon all. If the adult heirs had decided to enforce a settlement or accounting they should have had a guardian appointed for the minors; and appellant cannot legally be regarded in default because a settlement and accounting with the persons interested was not made.

We are of opinion that the amount of the notes and interest thereon which were held by the appellant as Trustee for John Kurtles, on which he had given to appellant for the procession and maintenance and family necessaries with which the Trustee had provided him, [illegible] proper charge against the accumulated interest which accrued on the fund, up to the time of the death of John Kurtles. Expenses, provisions and family necessaries were really [illegible] to John Kurtles, in lieu of payments of interest, and because there [illegible] they [illegible] no doubt accounts for the fact that [illegible] nor receive the interest which was [illegible] time or [illegible].

Equitably, therefore, the Trustee should [illegible] the interest in liquidation of the debt which [illegible] reference to its payment out of this interest.

But there is another reason why [illegible] application of this interest to [illegible]. The interest which had accrued [illegible] time of the death of John Kurtles [illegible] Kurtles; it was the property of [illegible] death it passed to the [illegible]

of his body under the terms of the will of Carl F.Kurfiss but the appellees are entitled to it as heirs at law, subject to the payment of the debts of John Kurfiss. The right, therefore, to apply it in liquidation of this debt of John Kurfiss is superior to the right of the heirs at law to receive it and it should therefore be so applied.

The question of compensation for the services of the Trustee which is raised by the appellants' assignment of errors and the cross-errors assigned by the appellees is a matter addressed to the sound discretion of the trial court.

It is apparent in this case that to have properly carried out the trust the appellant should have filed a bill in equity in the circuit court, bringing into court all the parties in interest during the lifetime of John Kurfiss, and then have made an accounting to the court. In this way all the matters would have been settled for which this suit was instituted, and he could then also have made an annual accounting to the court, and would have been in position to have made a final accounting promptly upon the death of John Kurfiss, and without any delay. His manner of carrying out the trust was also somewhat irregular and negligent, not only in the accounting but in keeping his accounts and in carrying into effect the directions given in the will; and while the trust estate suffered no loss or diminution on that account and his conduct of the affairs of the trust estate was clearly in good faith, yet his negligence and irregularities as Trustee were proper to be considered by the court in fixing the amount of compensation; and undoubtedly the court in fixing $50 instead of $150 claimed by the appellant took all these matters into consideration. We would not, therefore, be warranted in saying in this case that such discretion of the court has been abused in fixing the compensation of

made an [illegible]

of his body under the terms of the will of Carl F.Kurtzes but the appellees are entitled to it as heirs at law, subject to the payment of the debts of John Kurtzes. The right, therefore, to apply it in liquidation of this debt of John Kurtzes is superior to the right of the heirs at law to receive it and it should therefore be so applied. [illegible] The question of compensation for the services of the Trustee which is raised by the appellants' assignment of errors and the cross-errors assigned by the appellees is a matter addressed to the sound discretion of the trial court.

[illegible] It is apparent in this case that to have properly carried out the trust the appellant should have filed a bill in equity in the circuit court, bringing into court all the parties in interest during the lifetime of John Kurtzes, and then have made an accounting to the court. In this way all the matters would have been settled for which this suit was instituted, and he could then also have made an annual accounting to the court, and would have been in position to have made a final accounting promptly upon the death of John Kurtzes, and without any delay. His manner of carrying out the trust was also somewhat irregular and negligent, not only in the accounting but in keeping his accounts and in carrying into effect the directions given in the will; and while the trust estate suffered no loss or diminution on that account and his conduct of the affairs of the trust estate was clearly in good faith, yet his negligence and irregularities as Trustee were proper to be considered by the court in fixing the amount of compensation; and undoubtedly the court in fixing $50 instead of $150 claimed by the appellant took all these matters into consideration. We would not, therefore, be warranted in saying in this case that such discretion of the court has been abused in fixing the compensation of

the Trustee. Under the rule cited in Kingsbury vs Powers, 131 Ill. 182, we are of opinion that the costs were properly charged against the trust estate, and the costs on this appeal should be divided, appellan t paying one half and appellee the other half.

For the reasons stated the decree should be reversed in part, and the cause remanded with directions that in stating the account between the parties the interest which was accumulated on the trust fund at the time of the death of John Kurfiss should be applied in liquidation of the notes and interest of John Kurfiss, held by the appellant. In other respects the decree is affirmed.

Decree affirmed in part and reversed in part.

the Trustee. Under the rule cited in Kingsbury vs Powers, 151 III. 182, we are of opinion that the costs were properly charged against the trust estate, and the costs on this appeal should be divided, appellant paying one half and appellee the other half.

For the reasons stated the decree should be reversed in part, and the cause remanded with directions that in stating the account between the parties the interest which was accumulated on the trust fund at the time of the death of John Murfiss should be applied in liquidation of the notes and interest of John Murfiss, held by the appellant. In other respects the decree is affirmed.

Decree affirmed in part and reversed in part.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on FEB 1 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

gun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixty,
within and for the Second District of the State of Illinois.

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE L. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. BURKY, Clerk

E. M. LAVIS, Sheriff.

BE IT REMEMBERED, that at the April term, [illegible]

the Clerk's off[illegible] and a notice
following, to-[illegible]

Gen. No. 6367.

People of the State of Illinois.

appellee.

vs Appeal from Rock Island.

Henry Klehm, appellant.

Niehaus, P. J.

This is an appeal from an order of the Circuit Court of Rock Island County adjudging the appellant Henry Klehm guilty of contempt of court, and adjudging a fine of $25. against him, and costs of suit. It involves the question of the authority of the circuit court to make the disobedience of a subpoena issued by a notary public or commissioner empowered to take depositions of witnesses in a case pending in another county, the basis of contempt proceedings.

It appears from the evidence, that the appellant, who is a resident of Rock Island County, was subpoenaed by Elvira Sundberg, in her capacity of notary public and commissioner, to appear before her on the 17th. day of December 1915, and to produce at that time and place, all letters, checks, receipts telegrams and documentary evidence concerning his business with other defendants, to be used in evidence in a suit wherein the Mechanics and Merchants Savings Bank of Moline, Illinois, a corporation, was plaintiff, and John Klehm, George Klehm, Charles Klehm and Henry Klehm, as co-partners, were defendants, pending in the Superior Courtof Cook County.

The subpoena was duly served on the appellant in person on the 24th. day of November 1915; but he refused to obey the subpoena. The notary public, Elvira Sundberg, thereupon filed a petition in the Circuit Court of Rock Island County, alleging that on the 4th. day of October 1915, a dedimus potestatem under the seal of the Superior Court of Cook County, in the

Gen. No. 8307.

People of the State of Illinois,

appellee.

vs. Appeal from Rock Island.

Henry Klehm, appellant.

Mr. Justice, P. J.

This is an appeal from an order of the Circuit Court of Rock Island County adjudging the appellant Henry Klehm guilty of contempt of court, and adjudging a fine of $25. against him, and costs of suit. It involves the question of the authority of the circuit court to make the disobedience of a subpoena issued by a notary public or commissioner empowered to take depositions of witnesses in a case pending in another county, the basis of contempt proceedings.

It appears from the evidence, that the appellant, who is a resident of Rock Island County, was subpoenaed by Elvira Sundberg, in her capacity of notary public and commissioner, to appear before her on the 17th. day of December 1915, and to produce at that time and place, all letters, checks, receipts telegrams and documentary evidence concerning his business with other defendants, to be used in evidence in a suit wherein the Mechanics and Merchants Savings Bank of Moline, Illinois, a corporation, was plaintiff, and John Klehm, George Klehm, Charles Klehm and Henry Klehm, a co-partners, were defendants, pending in the Superior Court Cook County.

The subpoena was duly served on the appellant in person on the 8th. day of November 1915; but he refused to obey the subpoena. The notary public, Elvira Sundberg, thereupon filed a petition in the Circuit Court of Rock Island County, alleging that on the 4th. day of October 1915, a fiduciary potestatem under the seal of the Superior Court of Cook County, in the

case mentioned , was duly issued to her as Commissioner, empowering her to examine certain witnesses named in the notice and affidavit filed in that case; that the appellant was one of the witnesses to be examined; that she issued a subpoena duces tecum under her seal as notary, requiring the appellant to appear before her on the 7th. day of December 1915, and to bring with him, the papers and documentary evidence mentioned; and that he neglected and refused to do so.

Upon the filing of this petition, the Circuit Court ordered the clerk to issue an attachment, directed to the sheriff of Rock Island county, commanding him to take the body of the appellant, and bring him forthwith before the court, to be dealt with for contempt, for failure to obey the subpoena. Subsequently, another order was entered, directing that appellant appear and show cause instanter, why the court should not enter an order commanding him to be and appear as a witness for the plaintiff, before the notary mentioned, in obedience to the notary's subpoena.

The appellant thereupon filed a special appearance in the Circuit Court of Rock Island County; and asked the court to quash the writ of attachment issued; and thereafter the court ordered that the appellant appear before the notary, at the hour of nine o'clock, at her office in the city of Moline, to testify, and to produce the books, statements, papers and documents mentioned in the subpoena; and that in case of his failure to so appear, that he was directed tp appear before the Circuit Court of Rock Island county, at ten o'clock A. M. on the same day, and show cause why he failed to appear before the notary.

The notary thereupon filed in the circuit court of Rock Island county, a report, in which she states that the

case mentioned, was duly issued to her as Commissioner, empower-
ing her to examine certain witnesses named in the notice and
affidavit filed in that case; that the appellant was one of
the witnesses to be examined; that she issued a subpoena duces
tecum under her seal as notary, requiring the appellant to
appear before her on the 7th. day of December 1915, and to
bring with him, the papers and documentary evidence mentioned;
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the Circuit Court of Rock Island County; and asked the court to
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testify, and to produce the books, statements, papers [illegible]
documents mentioned in the subpoena; [illegible] in case of the
failure to so appear, that he was directed to appear [illegible] before
the Circuit Court of Rock Island county, at ten o'[illegible] .
on the same day, [illegible] show cause why [illegible] fore
the notary.

The notary thereupon filed in the [illegible] court of
Rock Island county, a report, in which [illegible] that the

appellant failed, and neglected to appear before her at the hour of nine o'clock, December 16th. as required by the order theretofore entered by the Circuit Court; and the appellant thereupon moved to strike from the files the report of the notary, and be discharged from said rule, and filed an answer to the petition of the notary; but the circuit court denied hhe motion to strike the report and to discharge the appellant, and held his answer to the report to be insufficient; and thereupon adjudged that the appellant's neglect and failure to be and appear before the notary, at nine o'clock A. M. on the 16th day of December and to produce the documents, books, and papers mentioned, was wilful, and without lawful excuse; and fined the appellant $25. and costs, for contemot of court.

The question presented by the record, as to the power and authority of the Circuit Court of Rock Island County, to punish summarily for contempt of court, under the circumstances detailed, is substantially the same as that raised in the case of Puterbaugh vs Smith. 131 Ill. 199; and it was there passed upon by the Supreme Court. It was held in that case, that the refusal of a witness to appear before a notary public and give his deposition, inobedience to a subpoena issued by the notary acting under the authority of a <u>dedimus potestatem</u>, in a case pending in another jurisdcition, could not be considered contempt of court of the tribunal administering the punishment.

In the case cited, the Circuit Court proceeded as provided by the statute, and in a summary way, as in the case at bar, to attach an offending witness for contempt of court, for failing to appear before a notary public, as directed by the Notary's subpoena. The proceedings in this case, first by petition, directing the attention of the court to the failure and neglect of the witness to appear before the notary, and f

appellant failed, and neglected to appear before her at the hour of nine o'clock, December 16th, as required by the order thereto fore entered by the Circuit Court; and the appellant thereupon moved to strike from the files the report of the notary, and be discharged from said rule, and filed an answer to the petition of the notary; but the circuit court denied the motion to strike the report and to discharge the appellant, and held his answer to the report to be insufficient; and thereupon adjudged that the appellant's neglect and failure to be and appear before the notary, at nine o'clock A. M. on the 16th day of December and to produce the documents, books, and papers mentioned, was wilful, and without lawful excuse; and fined the appellant $25. and costs, for contemt of court.

The question presented by the record, as to the power and authority of the Circuit Court of Rock Island County, to punish summarily for contempt of court, under the circumstances detailed, is substantially the same as that raised in the case of Pittsburgh vs Smith. 141 Ill. 189; and it was there passed upon by the Supreme Court. It was held in that case, that the refusal of a witness to appear before a notary public and give his deposition, in obedience to a subpoena issued by the notary acting under the authority of a *letimus potestatem*, in a case pending in another jurisdiction, could not be considered contempt of court of the tribunal administering the punishment.

In the case cited, the Circuit Court proceeded as provided by the statute, and in a summary way, [illegible] case at bar, to attach an offending witness for contempt of court, for failing to appear before a notary public, as directed by the Notary's subpoena. The proceeding in this case, first by petition, limiting the attention of the court to the failure and neglect of the witness to appear before the notary, and a

afterwards obtaining an order of the court commanding the witness to obey the subpoena, to appear before the notary, and then reporting the fact of his refusal to do so, while somewhat different in detail, yet in effect are substantially the same as those which were resorted to in the case cited.

In this case the proceedings were summary proceedings instituted for the same purpose, - namely, to punish the appellant for disobeying the mandate of the subpoena issued by a notary who was commissioner to take evidence in a case not pending in the court which administers the punishment for such contempt.. It is recognized as a well settled rule of law, that only the court whose order or authority is defied, has the power to punish for contempt, and that the court's authority cannot be considered as defied when the contempt arises from disobedience of a writ or mandate issued by another tribunal, in a case pending in another court. (Rapalje on Contempts, Sec. 13; Hawes on Jurisdiction of courts, Sec. 223.)

In this case, as in the case of Puterbaugh vs Smith supra, the summary proceedings were in one tribunal, for an act done in derogation of the authority of another tribunal; the ability of the tribunal administering the punishment, to exercise its ~~xxxxx~~ proper functions, was therefore not involved and the act charged, could not have had any tendency to hinder or delay the latter tribunal in the lawful execution of its authority, which is confined to matters pending within its jurisdiction. The principles enunciated and conclusions reached in the case of Puterbaugh vs Smith were reaffirmed and again emphasized, by the Supreme Court, in McIntire vs The People, 237 Ill. 26, and are clearly decisive of the questions here involved.

We are of opinion therefore, that the appellant cannotbe

afterwards obtaining an order of the court commanding the witness to obey the subpoena, to appear before the notary, and then reporting the fact of his refusal to do so, while somewhat different in detail, yet in effect are substantially the same as those which were resorted to in the case cited.

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In this case, as in the case of Pittsburgh vs Smith supra, the summary proceedings were in one tribunal, for an act done in derogation of the authority of another tribunal; the ability of the tribunal administering the punishment, to exercise its power proper functions, was therefore not involved and the act charged, could not have had any tendency to hinder or delay the latter tribunal in the lawful execution of its authority, which is confined to there pending within its jurisdiction. The principles enunciated and so clearly reached in the case of Pittsburgh vs Smith were reaffirmed and again emphasized, by the Supreme Court, in McIntire vs People, 227 Ill. 26, and are clearly inclusive of the questions here involved.

We are of opinion therefore, that the appellant cannot

considered as guilty of contempt of the Circuit Court of Rock Island County, in disobeying the subpoena of the Notary Public and the Circuit Court of Rock Island County was without power to punish the appellant for such disobedience. The judgment of the court is therefore reversed.

Judgment reversed.

considered as guilty of contempt of the Circuit Court of Rock Island County, in disobeying the subpoena of the Notary Public and the Circuit Court of Rock Island County was without power to punish the appellant for such disobedience. The judgment of the court is therefore reversed.

Judgment reversed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6396

Sadie Coonan, appellee

vs Appeal from Will.

James Straka et al appellants.

Niehaus, P. J.

This is a suit brought by the appellee, Sadie Coonan, in the Circuit Court of Will County, against the appellants, James Straka and Josephine Straka, doing business as Joliet Steam Dye House, to recover damages from personal injuries which the appellee claims to have sustained, as the result of being struck and thrown upon the ground, by appellants' automobile, when she was crossing Arch Court, a public street in the city of Joliet.

The declaration filed contains two counts. The first count alleges, that the automobile of the appellants was operated and managed by a servant and agent of the appellants; and that it was run at a high and dangerous rate of speed, at the crossing; and that the appellants' servant failed to give the appellee any warning or signal of the approach of the automobile and failed to exercise reasonable care to avoid a collision; that he carelessly, negligently, wilfully and wantonly struck, collided with and ran over the appellee, who was rightfully at the intersection of the street in question, and in the exercise of reasonable care for her own safety.

The second count of the declaration sets out sections 1 and 7 of the ordinances of the city of Joliet, requiring any vehicle, except when passing another vehicle ahead, to keep as near the right curb of the street as possible; and when turning into another street to the left, requiring it to turn around the intersection of the two streets; and it further alleges, that the appellants, by their servant and agent in

Gen. No. 6296

Sadie Cooman, appellee

vs Appeal from Will.

James Starks et al appellants.

Mishaus, P. J.

This is a suit brought by the appellee, Sadie Cooman, in the Circuit Court of Will County, against the appellants, James Starks and Josephine Starks, doing business as Joliet Steam Dye House, to recover damages from personal injuries which the appellee claims to have sustained, as the result of being struck and thrown upon the ground, by appellants' automobile, when she was crossing Aron Court, a public street in the city of Joliet.

The declaration filed contains two counts. The first count alleges, that the automobile of the appellants was operated and managed by a servant and agent of the appellants; and that it was run at a high and dangerous rate of speed, at the crossing; and that the appellants' servant failed to give the appellee any warning or signal of the approach of the automobile and failed to exercise reasonable care to avoid a collision; that he carelessly, negligently, wilfully and wantonly struck, collided with and ran over the appellee, who was rightfully at the intersection of the street in question, and in the exercise of reasonable care for her own safety.

The second count of the declaration sets out sections 1 and 7 of the ordinances of the city of Joliet, requiring any vehicle, except when passing another vehicle ahead, to keep as near the right curb of the street as possible; and when turning into another street to the left, requiring it to turn around the intersection of the two streets; and it further alleges, that the appellants, by their servant and agent in

charge of the automobile in question, carelessly and negligently drove and operated the automobile which struck the appellee, on the left hand side of the street on which it was then running, and that in turning the corner at the intersection of the street in question with Cass street, (the street which appellee was crossing) failed to operate and drive the automobile around the intersection of the two streets as required by the ordinance referred to; and that he carelessly, negligently, wilfully and wantonly then and there struck, collided with and ran over the appellee, who was rightfully upon said public street, and at the intersection; and in the exercise of reasonable care for her own safety.

To this declaration the appellants filed the general issue, upon which a trial was had before a jury. The jury found appellants guilty, and assessed appellee's damages at $900. Appellants thereupon made a motion for a new trial, which was overruled; and the Court entered judgment on the verdict of the jury; from which judgment this appeal is prosecuted.

Appellants contend, that the judgment should be reversed because errors were committed in instructions which were given for appelles at the trial, and in the refusal of instructions requested for appellants; also that the verdict is manifestly against the weight of the evidence.

There was a conflict in the evidence concerning the manner in which appellee received her injuries, and as to how the collision happened. The appellee testified that she was walking along the south side of Cass street, going toward the east, and in crossing Arch Court, stopped about 12 feet from the sidewalk, on the crossing, to converse with a friend, for a minute; and then left her friend, and walked about 8 or 10 feet further, on the crossing, and was within 10 ot 12 feet of the

charge of the automobile in question, carelessly and negligently drove and operated the automobile which struck the appellee, on the left hand side of the street on which it was then running, and that in turning the corner at the intersection of the street in question with Dase street, (the street which appellee was crossing) failed to operate and drive the automobile around the intersection of the two streets as required by the ordinance referred to; and that he carelessly, negligently, wilfully and wantonly then and there struck, collided with and ran over the appellee, who was rightfully upon said public street, and at the intersection; and in the exercise of reasonable care for her own safety.

To this declaration the appellants filed the general issue, upon which a trial was had before a jury. The jury found appellants guilty, and assessed appellee's damages at $300. Appellants thereupon made a motion for a new trial, which was overruled; and the Court entered judgment on the verdict of the jury; from which judgment this appeal is prosecuted.

Appellants contend, that the judgment should be reversed because errors were committed in instructions which were given for a police at the trial, and in the refusal of instructions requested for appellants; also that the verdict is manifestly against the weight of the evidence.

There was a conflict in the evidence concerning the manner in which appellee received her injuries, and as to how the collision happened. The evidence tended to show that she was walking along the north side of Dase street, going from the east, and in crossing that court, stepped about 15 feet from the sidewalk, on the morning, to converse with a friend, for a minute; and then left her friend, and walked about 10 feet further, on the crossing, and was within 10 or 12 feet of the

south east corner of Arch ~~Street~~ Court and Cass street, when she was struck by the automobile in question; that the automobile was coming along on the left hand side of Cass street, and turned directly to the left at the corner, instead of turning around the intersection of the two streets.

If the testimony of the appellee can be taken as true, the appellants' servant in operating the automobile, was guilty of negligence in running the machine on the left hand side of the street, and near the left curb, instead of the right, and in not turning around the intersection of the two streets, which was a violation of the traffic ordinance of the city of Joliet; and if the driver of the car had observed the requirements of the ordinance, the appellee would not have been struck, because she was beyond the point of the crossing, where the ordinance required appellant's car to run into Arch Court. The failure of appellants' servant to observe the requirements of the ordinance, under this state of facts , would therefore be direct cause of appellee being struck and knocked down.

There is a conflict in the evidence, principally between the appellee and the driver of the automobile, as to the circumstances under which the accident happened; as to the manner in which the automobile was driven, the rate of speed, and the consequences to appellee; and the jury, who saw and heard the witnesses , were in the best position to properly determine which of these parties testifying, gave the most nearly correct and truthful version of the affair. C. C. Ry. Co. v Bork, 128 Ill. App. 357; Wabash Ry. Co. v Barrett, 117 Ill. App 315; The jury evidently believed the testimony of the appellee as to the manner in which the automobile was driven, and in determining the circumstances underwhich appellee was injured; and when considered in the light of all the other evidence in

south east corner of Arch Street Court and Case street, when she was struck by the automobile in question; that the automobile was coming along on the left hand side of Case street, and turned directly to the left at the corner, instead of turning around the intersection of the two streets.

If the testimony of the appellee can be taken as true, the appellants' servant in operating the automobile, was guilty of negligence in running the machine on the left hand side of the street, and near the left curb, instead of the right, and in not turning around the intersection of the streets, which was a violation of the traffic ordinance of the city of Joliet; and if the driver of the car had observed the requirements of the ordinance, the appellee would not have been struck, because she was beyond the point of the crossing, where the ordinance required appellants' car to turn into Arch Court. The failure of appellants' servant to observe the requirements of the ordinance, under this state of facts, would therefore be direct cause of appellee being struck and knocked down.

There is a conflict in the evidence, relatively speaking, as to the speed and the driver of the automobile, and the circumstances under which the accident happened, as to the manner in which the automobile was driven, [illegible] consequences to [illegible] witnesses, were [illegible] which of these parties testifying, [illegible] correct and truthful version of [illegible] Berk, 168 Ill. App. 607; [illegible] v. Bo[illegible], [illegible] Ill. App. 615; The jury [illegible] as to the manner in which the accident happened, [illegible] terminating the [illegible] and when considered in the light of a [illegible] evidence in

the case, this court would not be warranted in saying that the jury were not justified in this conclusion. Viewed from this standpoint, the evidence fairly proves, that the appellants' servant violated the sections of the ordinance of the city of Joliet referred to, and that this negligence was the proximate cause of the injury to the appellee. Appellants' contention therefore, that the verdict is manifestly against the weight of the evidence, cannot be sustained.

It is true, however, that there is no evidence of a wanton or wilful violation of the ordinance; but this was not necessary as a basis for recovery, under the allegations of the declaration. There a declaration charges that a plaintiff was injured on account of a specific act of negligence, and also alleges that the act causing the injury was wanton and wilful proof of the negligence alone f urnishes a sufficient basis for recovery. Devine v Delano, 272 Ill. 166; Chicago & Grand Trunk Ry. Co. v Spurney, 197 Ill. 471; Weber Wagon Co. v Kehl, 139 id. 644.

The question of whether or not the act of appellants' servant in running into the appellee was wilful and wanton, was not submitted to the jury under the instructions given; the contention of appellants, that the fourth instruction given for appellee, submitted the question to the jury; and that the instruction might have misled the jury into believing that if the ordinance had been violated by the driver of the automobile on the left hand side of the street and not around the intersection, that such violation of itself could be regarded as a wilful and wanton act, cannot be sustained, inasmuch as the instruction is expressly limited to negligence charged in the declaration; and by its terms could not have led the jury to believe that it referred to anything but that.

the case, this court would not be warranted in saying that the jury were not justified in this conclusion. Viewed from this standpoint, the evidence fairly proves, that the appellants' servant violated the sections of the ordinance of the city of Joliet referred to, and that this negligence was the proximate cause of the injury to the appellee. Appellants' contention therefore, that the verdict is manifestly against the weight of the evidence, cannot be sustained.

It is true, however, that there is no evidence of a wanton or wilful violation of the ordinance; but this was not necessary as a basis for recovery, under the allegations of the declaration. There a declaration charges that a plaintiff was injured on account of a specific act of negligence, and also alleges that the act causing the injury was wanton and wilful proof of the negligence alone f urnishes a sufficient basis for recovery. Devine v Delano, 278 Ill. 186; Chicago & Grand Trunk Ry. Co. v Spurney, 197 Ill. 471; Weber Wagon Co. v Kehr, 103 id. 643.

The question of whether or not the act of appellants' servant in running into the appellee was wilful and wanton, was not submitted to the jury under the instructions given; the contention of appellants, that the fourth instruction given for appellee, submitted the question to the jury; and that the instruction might have misled the jury into believing that if the ordinance had been violated by the driver of the automobile on the left hand side of the street and not around the intersection, that such violation in itself could be regarded as a wilful and wanton act, cannot be sustained, inasmuch as the instruction is expressly limited to negligence charged in the declaration; and by its terms could not have led the jury to believe that it referred to anything but that.

Appellants complain of the refusal by the court, of two instructions requested by them, concerning the preponderance of the evidence; and in reference to the necessity of proof, that the appellee was in the exercise of due care for her own safety, as a necessary element upon which to base a recovery. It is apparent however, that the matters embodied in the instructions referred to, were fully contained in other instructions, which were given for the appellants. The two instructions referred to, would have been merely a repetition of what was already set out in these other instructions, and they were therefore properly refused.

Appellants also complain of the following in an instruction; "that while the number of credible and disinterested witnesses testifying on the one side or the other of a disputed point is a proper element for the jury to consider in determining where lies the preponderance of evidence, yet the preponderance of evidence in a case is not necessarily alone determined by the number of witnesses testifying to a particular fact or state of facts," etc. The words "and disinterested", referring to the witnesses, should have been omitted from the instructions but it does not appear that any injury could have resulted to the appellants, by this error; moreover, the fifth instruction given for appellants, states the rule on the same subject, with such clearness and accuracy, that the jury could not have been misled in any way by the use of the erroneous words in the instruction mentioned; the error, therefore, could not have been harmful to appellants, and was corrected by the fifth instruction.

Appellants also insist, that the amount of damages is excessive, and that the evidence shows the injuries received by the appellee were but slight. The evidence of the appellee's

Appellants complain of the refusal by the court, of two instructions requested by them, concerning the preponderance of the evidence; and in reference to the necessity of proof, that the appellee was in the exercise of due care for her own safety, as a necessary element upon which to base a recovery. It is apparent however, that the matters embodied in the instructions referred to, were fully contained in other instructions, which were given for the appellants. The two instructions referred to, would have been merely a repetition of what was already set out in these other instructions, and they were therefore properly refused.

Appellants also complain of the following in an instruction; "that while the number of credible and disinterested witnesses testifying on the one side or the other of a disputed point is a proper element for the jury to consider in determining where lies the preponderance of evidence, yet the preponderance of evidence in a case is not necessarily alone determined by the number of witnesses testifying to a particular fact or state of facts." To. The words "and disinterested", referring to the witnesses, should have been omitted from the instructions but it does not appear that any injury actually resulted to the appellants, by this error; however, the fifth instruction given for appellants, states the rule of the law correctly, with such clearness and accuracy, that the jury could not have been misled in any way by the use of the word [illegible] in the instruction mentioned; [illegible] not have been harmful to the [illegible] by the fifth instruction.

Appellants [illegible] that the [illegible] is excessive, and that the verdict shows the injuries received by the appellee were but slight. The evidence of the [illegible]

family physician, who treated her, tends to prove that the appellee, as a result of the injuries which she received, had retroversion or retro-displacement of the womb, which is not curable except by means of a major operation; that he examined appellee shortly before the accident, and that the physical disorder did not existbefore the accident; but did appear shortly thereafter; that the accident could have produced it, and it probably resulted therefrom. In view of this evidence as to the extent of the appellee's injuries, which the jury were warranted in believing as true, we do not regard the amount of the verdict and judgment as excessive.

We do not find any reversible error in the record, and the judgment is affirmed.

Judgment affirmed.

family physician, who treated her, tends to prove that the appellee, as a result of the injuries which she received, had retroversion or retro-displacement of the womb, which is not curable except by means of a major operation; that he examined appellee shortly before the accident, and that the physical disorder did not existbefore the accident; but did appear shortly thereafter; that the accident could have produced it, and it probably resulted therefrom. In view of this evidence as to the extent of the appellee's injuries, which the jury were warranted in believing as true, we do not regard the amount of the verdict and judgment as excessive.

We do not find any reversible error in the record, and the judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on FEB 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6307

R. A. Young, appellee

vs Appeal from Livingston.

Frank Gschwendtner, appellant.

Niehaus, P. J.

This is a suit in assumpsit brought by R.A. Young, the appellee, in the circuit court of Livingston County, against Frank Gschwendtner, to recover compensation for preparing certain plans and specifications for the construction of a dwelling house to be built on a farm near Pontiac. The declaration consisted of the common counts, to which the general issus was filed. There was a trial by jury, and a verdict finding the issues for the appellee, and assessing his damages at the amount claimed $150; upon which the court rendered judgment, and an appeal was taken from this judgment to this Court.

The points upon which the appellee relies to reverse the judgment, are, first, that the judgment is contrary to the evidence; and, that the court erred in giving the second and sixthinstruction for the appellee. It is not denied by the appellant, that he engaged the services of appellee, to draw plans and specifications for a dwelling he was contemplating to erect on his farm near Pontiac. There is a conflict of evidence as to the exact terms of the contract between the parties which was verbal; the appellant insisting that the price agreed upon was not payable until the blue prints and specifications were made to his satisfaction; while the appellee says, thathe agreed that he would change the blue prints in any way suggested by the appellant untill they were satisfactory. The evidence shows acceptance of the plans.

It is not disputed that the appellee drew the plans and specifications for the contemplated building. According to the

Gen. No. 6507

R. A. Young, appellee

vs Appeal from Livingston.

Frank Goshwendtner, appellant.

Mahaus, P. J.

This is a suit in assumpsit brought by R.A. Young, the appellee, in the circuit court of Livingston County, against Frank Goshwendtner, to recover compensation for preparing certain plans and specifications for the construction of a dwelling house to be built on a farm near Pontiac. The jurisdiction complained of the common counts, to which the general issue was filed. There was a trial by jury, and a verdict finding the issues for the appellee, and assessing his damages at the amount claimed $150; upon which the court rendered judgment, and an appeal was taken from this judgment to this Court.

The points upon which the appellant relies to reverse the judgment, are, first, that the judgment is contrary to the evidence; and, that the court erred in giving the second and sixthinstruction for the appellee. It is not denied by the appellant, that he engaged the services of appellee, to draw plans and specifications for a dwelling he was contemplating to erect on his farm near Pontiac. There is a conflict of evidence as to the exact terms of the contract between the parties which was verbal; the appellant insisting that the price agreed upon was not payable until the plans and specifications were made to his satisfaction; while the appellee says, that he agreed that he would change the plans in any way suggested by the appellant until they were satisfactory. The evidence shows acceptance of the plans.

It is not disputed that the appellee drew the plans and specifications for the contemplated building. According to the

evidence, they were completed and placed in the hands of contractors for the purpose of figuring on the contract to build the dwelling, but were then withdrawn at the instance of appellant, for the purpose of making certain changes which he wanted made; and some of these changes were made; but it is insistedby the appellant in his testimony, that he wanted a certain change made, and that appellee did not make it, nor offer to make it. Appellees testimony is to the effect, that he offered to make any additional changes in the plans and specifications, which the appellant wanted, and was ready at all times to make them, but that appellant never specified the changes that he wanted, and therefore they were not made.

According to appellee's testimony he was not at fault because additional changes appellant said he wanted, were not made;but the fault rested with appellant in not pointing themout and there was a conflict of evidence between the appellant and the appellee, upon this question, and it therefore presented a proper question of fact for the jury to pass upon. The jury were in the best position to determine this question correctly by considering the testimony of the parties to the suit, whom they saw and heard, in connection with all the other evidence in the case. It is the province of the jury to determine the facts which are in dispute; and a court of review, under the circumstances presented in this case, would not be warranted in setting aside the finding of the jury; this court would not be justified in saying, that the jury should have believed the testimony of the appellant, rather than that of appellee.

We have carefully considered the contention of appellants concerning the instructions given to the jury; and are of opinion that when considered together, and as a whole, they state the law with substantial accuracy; and that there is no reversible error in the case on account of the instructions given.

The judgment is affirmed. Judgment affirmed.

evidence, they were completed and placed in the hands of contractors for the purpose of figuring on the contract to build the dwelling, but were then withdrawn at the instance of appellant, for the purpose of making certain changes which he wanted made; and some of these changes were made; but it is insisted by the appellant in his testimony, that he wanted a certain change made, and that appellee did not make it, nor offer to make it. Appellees testimony is to the effect, that he offered to make any additional changes in the plans and specifications, which the appellant wanted, and was ready at all times to make them, but that appellant never specified the changes that he wanted, and therefore they were not made.

According to appellee's testimony he was not at fault because additional changes appellant said he wanted, were not made;but the fault rested with appellant in not pointing themout and there was a conflict of evidence between the appellant and the appellee, upon this question, and it therefore presented a proper question of fact for the jury to pass upon. The jury were in the best position to determine this issue on correctly by considering the testimony of the parties to the suit, whom they saw and heard, in connection with all the other evidence in the case. It is the province of the jury to determine the facts which are in dispute; and a court of review, under the circumstances presented in this case, would not be warranted in setting aside the finding of the jury; this court would not be justified in saying, that the jury should not have believed the testimony of the appellant, rather than that of appellee.

We have carefully considered the contention of the appellant concerning the instructions given to the jury; they are of a character that when considered together, and as a whole, they state the law with substantial accuracy; and that there is no reversible error in the case on account of the instructions given.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

IN A TERM OF THE APPELLATE COURT

[illegible] and held in Ottawa, on Tuesday, the [illegible] day of [illegible],
in the year of our Lord one thousand [illegible]
within and for the Second District [illegible]
present--The Hon. JOHN M. [illegible] presiding [illegible]
[illegible]
Hon. [illegible] L. [illegible]
Hon. [illegible]
[illegible]
E. M. [illegible]

BE IT REMEMBERED [illegible]

[illegible]

[illegible] Clerk's [illegible]
following, [illegible]

Gen. No. 6308.

William P. MacCracken, appellant.

vs Appeal from DuPage.

First National Bank of Wheaton,

et al. appellees.

Niehaus, P. J.

This action of replevin was brought by the appellant, William P. MacCracken, in the Circuit Court of DuPage County, to recover from the First National Bank of Wheaton, and Alexander Metzel and M. E. Taylor, appellees, two bonds of the John R. Thompson Company, of the value of $1,000 and $500 respectively. The bonds were not obtained by the writ of replevin; and appellant therefore filed with his declaration a count in trover, under which a recovery was sought, for conversion of the bonds.

The case was tried by the Court, without the intervention of a jury, and the issues were found in favor of the appellees, and judgment rendered against the appellant for costs; from which judgment this appeal is taken.

It appears from the evidence, that C. B. Howard, about September19, 1913, obtained a loan of $1200 from the appellee First National Bank of Wheaton; and pledged the bonds in question, as collateral security; and that the appellant had loaned him the bonds for that purpose; the money borrowed, being represented by a promissory note for the sum mentioned, payable in ninety days after date. Following this transaction Howard became financially involved, and was adjudged a bankrupt, in December, 1913.

When the appellant became aware of Howard's bankruptcy he sought to obtain a return of his bonds from the appellee bank; and his son, William P. MacCracken, Jr. who was a lawyer, at once

Gen. No. 8308.

William P. MacCracken, appellant.

vs. Appeal from DuPage.

First National Bank of Wheaton,

et al. appellees.

Mr. Justice Higbee, P. J.

This action of replevin was brought by the appellant, William P. MacCracken, in the Circuit Court of DuPage County, to recover from the First National Bank of Wheaton, and Alexander Metzel and M. E. Taylor, appellees, two bonds of the John R. Thompson Company, of the value of $1,000 and $500 respectively. The bonds were not obtained by the writ of replevin; and appellant therefore filed with his declaration a count in trover, under which a recovery was sought, for conversion of the bonds.

The case was tried by the Court, without the intervention of a jury, and the issues were found in favor of the appellees, and judgment rendered against the appellant for costs; from which judgment this appeal is taken.

It appears from the evidence, that C. E. Howard, about September 19, 1913, obtained a loan of $1,000 from the appellee First National Bank of Wheaton; and placed the bonds in question, as collateral security; and that the appellant had loaned him the bonds for that purpose; the money borrowed, being represented by a promissory note for the sum mentioned, payable in ninety days after date. Following this transaction Howard became financially involved, and was adjudged a bankrupt, in December, 1913.

When the appellant became aware of Howard's bankruptcy he sought to obtain a return of his bonds from the appellee bank and his son, William P. MacCracken, Jr. who was a lawyer, at once

entered into negotiations with the officers of the bank with this object in view. He had several conversations with the cashier of the bank, M. B. Taylor; also with the president, James S Feironnet; and with Alexander Metzel, the vice president, for the purpose of arranging to pay the bank the amount due on the Howard note, and thereby obtain a release of the bonds.

It is well settled as a matter of law, that inasmuch as the appellee Bank had obtained the possession of and was holding the bonds legally, it was necessary that the appellant should make a legal tender of the amount due upon the note, to the appellee Bank, and a demand for the bonds, before replevin or trover could be successfully maintained. (O. & M. Ry. Co. v Noe, 77 Ill. 513; Clark vs Lewis, 35 Ill. 417; Wabash R. R. Co. v House, 101 Ill. App. 397; Rosenbaum v King, 114 Ill. App. 648; Chase Bros. v Conners, 183 Ill. App. 418; Freehill v Hueni 103 Ill. App. 118.)

The appellant claims however, that the legal tender and the demand necessary, were waived by action of the parties, because the appellee Bank agreed to accept other funds in place of legal tender money; and that the officers of the Bank informed William P. MacCracken, Jr. who was acting for the appellant, that they would not receive or take the amount due upon the note even if legally tendered, and surrender the bonds; and the real question involved in this controversy, therefore, is one of fact, - namely, whether the amount due upon the note was legally tendered; or whether, as appellant claims, such demand and tender were legally waived, by the action of the parties.

Upon this question, the record disclosses a sharp conflict in the evidence, and it involves passing upon the credibility of the different witnesses who participated in the transactions and conversations which were had by the parties,

entered into negotiations with the officers of the bank with this object in view. He had several conversations with the cashier of the bank, M. E. Taylor; also with the president, James S Reitonnet; and with Alexander Metzel, the vice president, for the purpose of arranging to pay the bank the amount due on the Howard note, and thereby obtain a release of the bonds.

It is well settled as a matter of law, that inasmuch as the appellee bank had obtained the possession of and was holding the bonds legally, it was necessary that the appellant should make a legal tender of the amount due upon the note, to the appellee bank, and demand for the bonds, before replevin or trover could be successfully maintained. (O. & M. Ry. Co. v Moe, 77 Ill. 512; Clark vs Lewis, 36 I l. 417; Wabash R. R. Co. v Howes, 101 Ill. App. 387; Rosenbaum v King, 114 Ill. App. 648; Chase Bros. v Connors, 184 Ill. App. 418; Freehill v Hunt 103 Ill. App. 118.)

The appellant claims however, that the legal tender and the demand necessary, were waived by action of the parties, because the appellee Bank agreed to accept other funds in place of legal tender money; and that the officers of the Bank informed William F. MacCracken, Jr., who was acting for the appellant, that they would not receive or take the amount due upon the note even if legally tendered, or surrender the bonds; but that the real question involved in this controversy, therefore, is one of fact, - namely, whether the amount due upon the note was legally tendered; or whether, as claimed by the appellee, the demand and tender were legally waived, by the action of the parties.

Upon this question, the evidence [illegible] up conflict in the evidence, and it involves [illegible] the credibility of the witnesses [illegible] in the transactions and conversations [illegible] by the parties,

in reference to the matter. If the version of the appellees' witnesses is to be taken as the true version of the transactions and conversations between the parties, a demand and legal tender were not made and not waived; and it is clear that the trial court took this view of the matter, and found that no legal tender and no demand had been made; and that the appellee Bank was therefore entitled to hold the bonds, regardless of any other question arising in the case.

And the finding of a trial court upon a controverted question of fact, where the evidence is conflicting, is entitled to the same consideration as the verdict of a jury would be under the same circumstances; and a court of review is not warranted in setting aside such finding, unless it is clearly against the weight of the evidence. (Burgett v Osbornm 173 Ill. 227; Lane v Lessor, 135 Ill. 573; Chicago Trust & Savings Bank v Black, 73 Ill. App. 147; Snell v Cottingham, 72 Ill. 161; Coari v Olson, 91 Ill. 273; Adams v Squires 96 Ill. App. 458; Nimmo v Kuykendall, 85 Ill. 476; Somer v Elgin Condensed Milk Co., 87 Ill. App. 219.)

It was incumbent upon the appellant to establish the waiver of the demand and tender by a preponderance of the evidence. The record does not disclose that he did so, nor that the finding of the court upon the fact was against the weight of the evidence; apparently, the preponderance of the evidence does not show a proper demand not a legal tender; nor that such demand and tender were waived by the appellees. The finding of the court was therefore proper; and the finding does not conflict with the propositions of law held by the court. We are of opinion that the propositions of law held by the court were correctly held.

We find no error in the record; the judgment is therefore affirmed.

Judgment Affirmed.

in reference to the matter. If the version of the appellees' witnesses is to be taken as the true version of the transactions and conversations between the parties, a legal and legal tender were not made and not waived; and it is clear that the trial court took this view of the matter, and found that no legal tender and no demand had been made; and that the appellee Bank was therefore entitled to hold the bonds, regardless of any other question arising in the case.

And the finding of a trial court upon a controverted question of fact, where the evidence is conflicting, is entitled to the same consideration as the verdict of a jury would be under the same circumstances; and a court of review is not warranted in setting aside such finding, unless it is clearly against the weight of the evidence. (Barrett v Osborne 172 Ill. 327; Lane v Lesser, 183 Ill. 273; Chicago Trust & Savings Bank v Black, 72 Ill. App. 147; Snell v Cottingham, 72 Ill. 161; Coart v Olson, 21 Ill. App. 273; Adams v Squires 85 Ill. App. 358; Nimmo v Kuykendall, 58 Ill. 475; Somer v Elgin Combined Mfg Co., 87 Ill. App. 419.)

It was a sufficient upon the appellant to establish the waiver of the demand and tender by a preponderance of the evidence. The record does not disclose that he did so, nor that the finding of the court upon the fact was against the weight of the evidence; conversely, the preponderance of the evidence does not show a proper demand and a legal tender; nor that such demand and tender were waived by the appellees. The finding of the court was therefore proper; and the finding does not conflict with the propositions of law held by the court. We are of opinion that the propositions of law held by the court were correctly held.

We find no error in the record; the judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

2357

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

204 I.A. 21

BE IT REMEMBERED, that afterwards, to-wit: on [illegible] 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6313.

J. R. McDole, appellee

vs Appeal from City Court Aurora.

German American National Bank

of Aurora. appellant.

Niehaus, P. J.

This is a suit originally commenced before a justice of the peace, by the appellee, J. R. McDole, who was a depositor in the Bank of appellant. The suit was brought on a check which the appellee issued to Fred B. Shearer, on the 5th. day of August 1915, and which was payable to Fred B. Shearer, his attorney, for the sum of $93.36, that being the balance claimed by the appellee to have remained to his credit on his deposit account, in appellant's bank. The check was presented for payment, by Sherer, to the Bank, and payment was refused, on the ground that there were no funds in the Bank to appellee's credit.

The testimony of John C. Weiland, assistant cashier in the appellant bank, is to the effect that on the 16th. day of April, 1915, a woman who was a stranger to him, and to the Bank, appeared at the Bank and presented for payment, a check drawn on the Riddell National Bank, of Riddell, Indiana, dated April 14, 1915, for the sum of $90. which was payable to the order of Laura H. Haskell and signed by John M. Haskell; and that he inquired of the woman. if she knew of anyone in the city, who would endorse the check, so that the bank would be warranted in paying it. The woman replied that the appellee who was then standing next to her, was acquainted with her; and he thereupon turned the check over to appellee, and asked him if he would endorse ~~the name~~ his name upon it; and that

Gen. No. 8312.

J. R. McDole, appellee

vs. Appeal from City Court Aurora.

German American National Bank

of Aurora. appellant.

Mahaney, P. J.

This is a suit original by commenced before a justice of the peace, by the appellee, J. R. McDole, who was a depositor in the Bank of appellant. The suit was brought on a check which the appellee issued to Fred E. Shearer, on the 6th. day of August 1915, and which was payable to Fred E. Shearer, his attorney, for the sum of $81.88, that being the balance claimed by the appellee to have remained to his credit on his deposit account, in appellant's bank. The check was presented for payment, by Shearer, to the Bank, and payment was refused, on the ground that there were no funds in the Bank to appellee's credit.

The testimony of John C. Williams, assistant cashier in the appellant bank, is to the effect that on the 10th. day of April, 1915, a woman who was a stranger to him, came to the Bank, appeared at the Bank and presented for payment, a check drawn on the Kirkpatrick Mills and Park, of Kirkpatrick, Illinois, dated April 14, 1915, for the sum of $80, which was payable to the order of Harry V. Hawkins and signed by John [illegible]. Hawkins; and that he inquired of the woman if she knew anyone in the city, who would endorse the check, [illegible] warranted in paying it. The woman [illegible] who was then standing next to her, [illegible] and he thereupon turned the check over to [illegible], and asked him if he would endorse the name [illegible] it; and that

appellee said he would; and the cashier then handed appellee a pen, and the check was endorsed by appellee at that time, in his presence; the appellee signing his name upon the back of the check; and the woman signing the name of Laura H. Haskell below the name of appellee. Thereupon the amount of the check was paid to the woman and the bank. The following day the check was sent to a Chicago bank for collection; and through the Chicago Bank, on April 30th. the check was returned to the appellant bank marked "No account". He further testified, that upon the return of the check he telephoned to the appellee that the check had been returned unpaid, and asked him what he would do about it; whereupon appellee replied, that he would do nothing The cashier thereupon informed the appellee, that the bank would charge his account with the amount of the check; and that after waiting until the 26th. of April, did charge the check to the account; also $2.60 protest fees, which had been paid by the bank.

The appellee denied that he signed his name upon the check in question, and denied that he knew anybody by the name of Laura H. Haskell, the payee named in the check; and denied that he was in the bank at the time testified to by the cashier; and that the first knowledge he had of the transaction testified to by the cashier, was when he was notified of the return of the check, and the refusal of payment thereon by the bank at Riddell, Indiana. There was other proof also offered by the appellee, tending to show, that he was not in the bank at the time fixed by the testimony of the cashier. There was a trial by a jury, who returned a verdict in favor of the appellee, for $93.36; and the court entered judgment upon the verdict, from which this appeal is taken.

The appellant contends, that the verdict of the jury was contrary to the evidence, and that the trial court should have granted a new trial upon the ground of newly discovered evidence;

appellee said he would; and the cashier then handed appellee a pen, and the check was endorsed by appellee at that time, in his presence; the appellee signing his name upon the back of the check; and the woman signing the name of Laura H. Hadsell below the name of appellee. Thereupon the amount of the check was paid to the woman and the bank. The following day the check was sent to a Chicago bank for collection; and through the Chicago Bank, on April 30th, the check was returned to the appellant bank marked "No account". He further testified, that upon the return of the check he telephoned to the appellee that the check had been returned unpaid, and asked him what he would do about it; whereupon appellee replied, that he would do nothing. The cashier thereupon informed the appellee, that the bank would charge his account with the amount of the check; and that after waiting until the 26th. of April, it charged the check to his account; also $3.00 protest fees, which had been paid by the bank.

The appellee denied that he signed his name upon the check in question, and denied that he [illegible] anything to the [illegible] of Laura H. Hadsell, the payee named in the check; [illegible] that he was in the bank at the time testified to by the cashier; and that the first knowledge he had of the transaction testified to by the cashier, was when he was notified [illegible] the return of the check, and the refusal of payment thereon by the bank at Biddell, Indiana. There was other [illegible] the appellee, tending to show, that he was not [illegible] at the time fixed by the testimony [illegible] by a jury, who returned a verdict [illegible] $83.36; and the court entered judgment [illegible] which this appeal is taken.

The assignment contends, that the verdict of the jury is contrary to the evidence, and that the court abused its [illegible] granted a new trial upon the ground of [illegible] discovered evidence;

the newly discovered evidence being set forth in an affidavit which the appellant offered in support of his motion for a new trial; and it sets forth that one Nicholas Steichen, was present in the bank at the time the check was endorsed by the appellee and saw the appellee endorse the check; and the affidavit of Nicholas Steichen states, that he was standing immediately back of the appellee, and an unknown woman, and that at that time and place he saw the unknown woman produce a check and ask the cashier to cash the same for her, and he heard the cashier say to the woman that she was not known, and that if she would get some one known to him, to identify her, and to endorse the check, he would cash the same for her; and that he heard the woman say that she knew the appellee, and heard the woman ask the appellee if he would endorse his name upon the check, and that the appellee said he would; and that thereupon the cashier handed the check to appellee, and that he saw the appellee write upon the back of the check and hand the same back to the cashier; and that he then saw the cashier count out and pay the money to the woman.

One of the vital questions involved in this appeal, is whether or not the check in question is a foreign bill of exchange A check is a bill of exchange drawn on a bank payable on demand. (Section 184, Negotiable Instruments Act.) And an Inland Bill of Exchange is a bill which is or on its face purports to be drawn and payable within this state. Any other bill of exchange is a foreign bill. (Section 188, Negotiable Instrument Act.)

The check in question appears to have been drawn or made in the State of Indiana, and endorsed in the State of Illinois. This makes it a foreign bill of exchange. (Sublette Exchange Bank v Fitzgerald, 168 Ill. App. 24.) And being a foreign bill of exchange, before an endorser thereon could be held under the

the newly discovered evidence being set forth in an affidavit which the appellant offered in support of his motion for a new trial; and it sets forth that one Nicholas Stelcken, was present in the bank at the time the check was endorsed by the appellee and saw the appellee endorse the check; and the affidavit of Nicholas Stelcken states, that he was standing immediately beside of the appellee, and an unknown woman, and that at that time and place he saw the unknown woman produce a check and ask the cashier to cash the same for her, and he heard the cashier say to the woman that she was not known, and that if she would get some one known to him, to identify her, and to endorse the check, he would cash the same for her; and that he heard the woman say that she knew the appellee, and heard the woman ask the appellee if he would endorse his name upon the check, and that the appellee said he would; and that thereupon the cashier handed the check to appellee, and that he saw the appellee write upon the back of the check and hand the same back to the cashier; and that he then saw the cashier count out and pay the money to the woman.

One of the vital questions involved in this case is, is whether or not the check in question is a foreign bill of exchange. A check is a bill of exchange drawn on a bank payable on demand. (Section 184, Negotiable Instruments Act.) And an inland bill of Exchange is a bill which is or on its face purports to be drawn and payable within this state. [illegible] such bill is a foreign bill. (Section 188, Negotiable Instruments Act.)

The check in question [illegible] or made in the State of Indiana, and endorsed in [illegible] of Illinois. This makes it a foreign bill of exchange. (Cu[illegible] Exchange Bank v Fitzgerald, 188 Ill. App. 24.) And [illegible] foreign bill of exchange, before an endorser thereon could be held under the [illegible]

Negotiable Instrument Act, it is necessary to make proof that it was protested for non-payment, and the protest must be annexed to the bill or it must contain a copy thereof; and must be under the hand and seal of the notary making it. (Sections 151 and 152, Negotiable Instruments Act; Sublette Exchange Bank v Fitzgerald, supra.)

The appellant offered a paper purporting to be a notice of protest, executed in the state of Indiana. The offer was objected to by the appellee; the objection was sustained, and the paper ruled out; and the ruling out of the paper offered, is assigned for error. The paper which was ruled out, does not appear to be in the bill of exceptions; and we are therefore unable to pass upon its character or contents, or the question of its admissibility; but must assume that the court properly excluded it.

There is no evidence in the record, that the check in question, as a foreigh bill of exchange, was protested as required by law, to charge an endorser with liability thereon. That being the condition of the proofs, there was no error in giving to the jury instructions 7 and 8 which are complainedof by the appellant. Theseinstructions correctly stated the law applicable to the evidence.

Appellant contends, that notice of the presentation for payment of the check in question, and refusal to pay the same, was not required to be proven in order to charge the endorser of this check, because the instrument was accommodation paper It is sufficient to say in reference to this contention, that the evidence shows that the check in question was not endorsed by the endorser for his accommodation; and that if the check was endorsed by appellee, he endorsed it for the accommodation of some one else. It was therefore not accommodation paper

Negotiable Instrument Act, it is necessary to make proof that it was protested for non-payment, and the protest must be annexed to the bill or it must contain a copy thereof; and must be under the hand and seal of the notary making it. (Sections 151 and 152, Negotiable Instruments Act; Sublette Exchange Bank v Fitzgerald, supra.)

The appellant offered a paper purporting to be a notice of protest, executed in the state of Indiana. The offer was objected to by the appellee; the objection was sustained, and the paper ruled out; and the ruling out of the paper offered, is assigned for error. The paper which was ruled out, does not appear to be in the bill of exceptions; we are therefore unable to pass upon its character or contents, or the question of its admissibility; but must assume that the court properly excluded it.

There is no evidence in the record, that the check in question, as a foreign bill of exchange, was protested as required by law, to charge an endorser with liability thereon. That being the condition of the proofs, there was no error in giving to the jury instructions 7 and 8 asked for respectively by the appellant. These instructions correctly state the law applicable to the evidence.

Appellant contends, that the [illegible] notification for payment of the check in question, [illegible] was not required to be given in order [illegible] of this check, [illegible] instruction [illegible] notice. It is sufficient to say in reference to [illegible], that the evidence does not show the check in [illegible] was endorsed by the endorser [illegible] the check was endorsed by [illegible], he [illegible] accommodation of some one else. It was therefore not an accommodation paper

which made notice of protest unnecessary within the meaning of the law. (First Nat. Bank v Sandmeyer, 164 Ill. App. 98) But inasmuch as there is no proof in the case, that the instrument sued on was properly protested, as a foreign bill of exchange, as required by the statute, the appellee could not be held liable; and the jury properly found the issues in his favor and for the balance remaining to his credit in the appellant Bank, without deducting therefrom the amount of the check in question.

The newly discovered evidence, commented on by appellant did not present matter which would have entitled the appellatt to recover. If such evidence were added to the evidence in the record, the proper proof of protest required by law, would still be lacking. It is evident therefore, that the newly discovered evidence did not furnish a sufficient legal ground for a new trial; and the motion for a new trial was properly denied.

The judgment is affirmed.

Judgment affirmed.

which made notice of protest unnecessary within the meaning of the law. (First Nat. Bank v Sandmeyer, 184 Ill. App. 98) But inasmuch as there is no proof in the case, that the instrument sued on was properly protested, as a foreign bill of exchange, as required by the statute, the appellee could not be held liable; and the jury properly found the issues in his favor and for the balance remaining to his credit in the appellant Bank, without deducting therefrom the amount of the check in question.

The newly discovered evidence, commented on by appellant did not present matter which would have entitled the appellant to recover. If such evidence were added to the evidence in the record, the proper proof of protest required by law, would still be lacking. It is evident therefore, that the newly discovered evidence did not furnish a sufficient legal ground for a new trial; and the motion for a new trial was properly denied.

The judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on FEB 1 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

IN A TERM OF THE APPELLATE COURT,

[illegible] and held at Ottawa, on Tuesday, [illegible] in the year of our Lord [illegible] within and for the Second District [illegible]

resent--The Hon. JOHN M. WISEMAN, [illegible]

Hon. DUANE L. CARNES, [illegible]

Hon. DORRANCE DIXELL, [illegible]

CHRISTOPHER [illegible]

E. M. DAVIS, [illegible]

BE IT REMEMBERED, [illegible]

he Clerk's office [illegible]

ollowing, to-wit:

Gen. No. 6316. Agenda 61.

August C. Jahnke,
Defendant in Error,

-vs-

Writ of Error to Circuit Court, Lake County.

Stanley Biolos, William A. Birk, and Birk Brothers Brewing Company, a Corporation,
Plaintiffs in Error.

NIEHAUS, P. J.

This is a suit brought by petition in equity to the circuit court of Lake county by August C. Jahnke, defendant in error, against plaintiffs in error, Stanley Biolos, William A. Birk, and Birk Bros, Brewing Co., a corporation, to enforce a mechanic's lien which the defendant in error claims to have against the premises described in the petition. The petition alleges that the defendant in error is by occupation a contractor and builder; and that on or about September 1, 1913, he made a verbal contract with the plaintiff in error, Stanley Biolos, to repair, alter and improve a saloon and dwelling house situated on the premises in question; that the premises were in the possession of Stanley Biolos under a contract of sale from the owners, William A. Birk and Birk Bros. Brewing Co., and that under said contract with Biolos defendant in error was to furnish, and did furnish all necessary materials and labor for repairing, altering and improving said building, and that Biolos agreed to pay therefor the sum of $452, by the terms of said contract.

The petition also alleges that William A. Birk and Birk Bros.Brewing Co., knowingly permitted said Stanley Biolos to contract for the improvement mentioned, and the materials and labor used in making said improvement; that they authorized Biolos to make such contract with the defendant in error for the improvement; that defendant in error complied with his contract and completed the improvement in accordance with the terms thereof and that said Biolos and said William Birk, the plaintiffs in error, neglected and refused to pay for the same, and that therefore he is entitled to a lien on the premises in question.

The plaintiffs in error, William A. Birk and Birk Bros. Brewing Co., filed an answer denying that they or either of them knowingly permitted Biolos to contract for said improvement, and the materials and labor used in making the same, and denying that said Biolos was authorized by them, or either of them, to make said contract for said improvement.

The cause was referred to the Master, to hear the proofs and report his conclusions; and the Master reported that the defendant in error was entitled to a lien against the premises in question for the sum claimed; namely, $452.; and the court thereupon entered a decree requiring plaintiffs in error to pay, and that in default of such payment decreed that the premises be sold to satisfy said lien; from which decree this appeal is taken.

The evidence taken in the case shows that the premises in question are situated in North Chicago, and consist of a house and lot, the house being a store building with four living rooms

The petition also alleges that [illegible] William Birk and Brown.Brewing Co., knowingly permitted and [illegible] to contract for the improvement [illegible] and labor used in making said improvement; that [illegible] mechanics Bilors to make such contract with the [illegible] error for the improvement; that defendant in error [illegible] completed the improvement in [illegible] said Bilors and said William Birk, the [illegible] error, neglected and refused to pay for the [illegible] mechanics lien entitled to a lien on the premises in [illegible].

The plaintiffs in error, William [illegible] Birk and Birk Brewing Co., filed an answer denying [illegible] knowingly permitted Bilors to contract [illegible] the materials and labor [illegible] said Bilors [illegible] said contract for [illegible].

The cause [illegible] and report his conclusion; [illegible] tenant in error [illegible] in question for the [illegible] thereupon entered [illegible] and the [illegible] said to [illegible] tion.

The evi[illegible] question are [illegible] and lot, [illegible]

in the rear. The property is owned by Birk Brothers Brewing Co., a corporation, doing business in the city of Chicago, forty miles distant from the premises, but legal title to the premises was held in the name of William A. Birk, who was president of the Birk Brothers Brewing Co.; that about two years before the filing of the petition referred to, the Birk Brothers Brewing Co., made a contract with the plaintiff in error, Stanley Biolos, for the sale of the premises to him in consideration of $1250, to be paid in installments, $100 to be paid in cash, $200 on May 1, 1911, and $20 on the first of each month from May 1, 1911, until paid, and that Biolos went into possession under this contract and was holding the premises under it at the time of the making of the contract with the defendant in error; that at the time of making the contract there was a balance remaining due on the purchase price of about $600.

Biolos wanted to raise the building and construct another story under it. He went to Chicago to see the owners about getting a loan for this purpose, and talked with William A. Birk concerning such a loan; according to the evidence, which is not disputed, he was told by Birk, acting on his own behalf, and for the Brewing Company, that they would not make any loan to him for that purpose; and further, not to make any improvements on the property. Biolos afterward informed Birk that he had made arrangements to procure a loan from Mr. Edwards, and was going to pay the Brewing Company off; and wanted the abstract sent to Edwards, which was done. Mr. Birk also testified that he again told him not to make any improvements unless he had the money to make them. Birk also testified that he did not know that any improvements were going to be made on the building until Biolos came to him and asked for a loan of $150, to pay off some men who had been at work putting in a concrete foundation under the building; that Biolos at that time informed him that he

in the rear. The property is owned by Birk Brothers Brewing Co., a corporation, doing business in the city of Chicago, forty miles distant from the premises, but legal title to the premises was held in the name of William A. Birk, who was president of the Birk Brothers Brewing Co.; that about two years before the filing of the petition referred to, the Birk Brothers Brewing Co., made a contract with the plaintiff in error, Stanley Bialos, for the sale of the premises to him in consideration of $1250, to be paid in installments, $100 to be paid in cash, $500 on May 1, 1911, and $50 on the first of each month from May 1, 1911, until paid, and that Bialos went into possession under this contract and was holding the premises under it at the time of the making of the bonds at issue herein; that at the time of making the contract there was a mortgage on the premises for about $600.

Bialos wanted to raise the building and construct another story under it. He went to Chicago to see [illegible] about getting a loan for this purpose, [illegible] such a loan; according to [illegible] was told by Birk, acting on behalf of [illegible] Company, that they would not make [illegible] and further, not to [illegible] Bialos afterward interested Birk [illegible] loan from [illegible] and wanted the mortgage [illegible] also testified that [illegible] unless he [illegible] did not know that [illegible] building until Bialos [illegible] pay off some [illegible] under the building; that [illegible]

could not get the $150 on the loan which he was to get from Edwards and therefore wanted Birk to help with the loan so that the men could be paid off. Birk testified that he again told Biolos not to put any more money into the property, that it wasn't in his name; that he did not own it, but only had a contract for it and not to make any improvements.

The evidence shows that after these conversations with Birk Biolos made the contract with the defendant in error. It does not appear that the owners of the property were at any time at or near the premises while the alleged improvements were being made, and there is nothing in the record which conflicts with Mr.Birk's testimoney that he did not see the premises or know of the so-called improvements having been made until at least ninety days after they had been completed. There is no evidence wherever that William A. Birk, or Birk Brothers Brewing Co., at any time, consented to the contract made with the defendant in error, or approved it; nor that William A. Birk or the Birk Brothers Brewing Co., ever approved of or consented to the work that was done, nor the furnishing of materials.

The basis upon which the defendant in error seeks to hold the premises liable for the enforcement of his lien as alleged in his petition, is that William A. Birk and the Birk Brothers Brewing Co., knowingly permitted the making of the contract in question. This is a material allegation, and it was necessary for the defendant in error to prove it; not having done so, he is not entitled to the lien claimed. The decree which finds that defendant in error was entitled to a mechanic's lien against the premises in question and enforcing it by directing a sale of the premises is therefore erroneous.

[illegible]

could not get the $150 on the loan which [illegible] and therefore wanted Birk to help with the loan so that the men could be paid off. Birk testified that [illegible] not to put any more money into the property, that it wasn't in his name; that he did not own it, but only had [illegible] contract for it and not to make any improvements.

[illegible] The evidence shows that [illegible] Birk Bialos made the contract with the [illegible] in error. It does not appear that the owners of the property [illegible] any time at or near the premises while the alleged improvements were being made, and there is nothing in the record which contradicts Mr. Birk's testimony that he did not see the premises or know [illegible] improvements having been [illegible] had been completed. There [illegible] Birk, or Birk brothers knowing [illegible] contract made with [illegible] that William A. Birk [illegible] of or connected [illegible] materials.

The basis [illegible] premises liable [illegible] petition, is [illegible] knowingly permitted [illegible] is a material [illegible] error to reverse it; [illegible] lion claimed. [illegible] entitled to [illegible] enforcing it by [illegible] erroneous.

A number of other questions are raised on this appeal with reference to the admissibility of evidence adduced before the Master, and concerning other directions in the decree with reference to the payment of any surplus remaining after sale of the premises, but in view of the conclusion hereinbefore stated it is unnecessary to discuss or pass upon the questions raised.

The decree is reversed.

Decree reversed.

A number of other questions are raised on the appeal with reference to the admissibility of evidence adduced before the Master, and concerning other directions in the decree with reference to the payment of any surplus remaining after sale of the premises, but in view of the conclusion hereinbefore stated it is unnecessary to discuss or pass upon the questions raised.

The decree is reversed.

Decree reversed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

2000

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6269. Ag. No. 5.

The People of the State
of Illinois,
Defendant in Error,
-vs- Error to Bureau.
Charles Buckman,
Plaintiff in Error.

CARNES, J.

Charles Buckman, plaintiff in error, hereinafter called the defendant, was engaged in the junk business at Spring Valley, Illinois. Charles Eisentrager broke into the power house of the Western Sand and Gravel Company and stole some insulated copper wire, a brass lubricator, and a controller handle, burned the insulation off the wire, burned and broke the controller handle and the lubricator to prevent identification, and thentook this property to the defendant and sold it. The defendant was indicted, charged with the offense of receiving stolen property(Criminal Code, Sec. 239, J.& A. 3892) described in each of the two counts in the indictment as forty pounds of copper wire of the value of 18 cents per pound; one lubricator of the value of $5.00; one controller handle of the value of $6.00; five pounds of brass ~~fittings~~ of the value of 70 cents; five pounds of brass fittings of the value of 75 cents, averred in each count to be of the goods and chattels of the Western Sand and Gravel Company, described in one count as a corporation, organized and incorporated under and by virtue of the laws of the state of Illinois, and in the other count ~~as~~ a corporation, without stating how or where it was incorporated. The verdict was as follows:- " We, the jury find the defendant, Charles Buckman, guilty of receiving stolen property, knowing the same to be

Gen. No. 6269. Ag. c. 5.

The People of the State
of Illinois,
Defendant in Error,

-vs-

Error to Bureau.

Charles Buckman,
Plaintiff in Error.

CARMES, J.

Charles Buckman, plaintiff in error, herein referred to as the defendant, was convicted in the Junk Business Court of Cook County, Illinois. Charles Blumenthal brought into the junk business the Western Sand and Gravel Company and told some insulated copper wire, a brass lubricator, and a controller handle, burned the insulation off the wire, carried and broke the controller handle and the lubricator to pieces and [illegible] the property to the defendant and [illegible]. The defendant was indicted, on trial with the offense of receiving stolen [illegible] (Ill. Rev. Stat. 239, 1.3 A. 8822) described in each [illegible] the indictment as forty pounds of copper wire [illegible] per pound; one lubricator [illegible]; one controller handle of the value of [illegible]; five pounds [illegible] of the value of 70 cents; [illegible] of the value of 75 cents, averred in [illegible] of the Western [illegible] a corporation, [illegible] the laws of the [illegible] corporation, without [illegible] verdict was as follows: [illegible] Buckman, guilty of receiving [illegible] property, knowing it to [illegible]

stolen, for the defendant's own gain and to prevent the owner from again possessing the same, in manner and form as charged in the indictment and we further find from the evidence the value of the property so recovered to be Three Dollars and Fifty Cents. And we further find from the evidence that the age of the Defendant is 40 years." (The word "recovered" should have been "received". The mistake was probably a clerical error.) There was a judgment of $25.00 fine and costs of suit, and that the defendant be confined in the county jail "for and during the period of thirty days from and after this date, and that he be thereafter discharged."

The defendant brings the case here on a writ of error, and argues that the verdict does not find the value of the property "received", bought or concealed by him, and therefore is not responsive to the issues and no judgment should have been rendered upon it. The clerical error or the mistake in the use of the word was not called to the attention of the court on the motion for a new trial. Defendant's counsel was expressly requested to state reasons in support of the motion, and did state his reasons, not including this one. It was probably not then noticed by either court or counsel. We think a reading of the entire verdict leaves no question that the jury found the sum named to be the value of the property received. The verdict should be liberally construed and all reasonable intendments indulged in its support. People v Brown, 273 Ill.169,177, and cases there cited. Under the rule there announced the verdict was sufficient.

It is assigned as error that the judgment is contrary to law, and our attention is directed to that clause of the judgment that fixes the imprisonment to begin at the date of the judgment. That

stolen, for the [illegible] again and [illegible] in-
again possessing the [illegible]
detinent and we further find [illegible] ver-
perty so recovered to be [illegible] and [illegible]. [illegible]
further find from the evidence [illegible] 40
years." (The word "recovered" [illegible]
mistake was probably [illegible]
$25.00 fine and [illegible] in
the county jail [illegible]
after this [illegible]

The de[illegible]
and argues that [illegible] "recei-
perty "received", [illegible]
responsive to the [illegible]
upon it. The [illegible]
was not called [illegible]
new trial. [illegible]
reasons in [illegible]
including this [illegible]
court or [illegible]
no question [illegible]
property [illegible]
all reasonable [illegible]
275 Ill.[illegible]
nounced [illegible]

It [illegible]
and our [illegible]
fixes the [illegible]

was error. The judgment should not have fixed the day or hour at which it should begin or end. Johnson v. The People, 83 Ill. 431. But if there are no other errors in the record the cause should be remanded for a proper sentence as held in People v.Elliott, 272 Ill. 592,603, following Johnson v.The People, supra.

It is argued that the evidence does not support the allegations that the Western Sand and Gravel Company was a corporation. Section 486 of our criminal code provides that in all criminal prosecutions involving proof of the legal existence of a corporation user shall be prima facie evidence of such existence. Under this statute proof of user if competent whether the corporation is domestic or foreign. Kincaid v The People, 139 Ill. 213,216. Proof of the defacto existence of a corporation by reputation or otherwise, is admissible. Kossakowski v.The People, 177 Ill. 564; Graff v.The People, 208 Ill. 312. In the present case the people proved that the company was conducted by a president, secretary, treasurer, and manager; that it had a superintendent; that there were stockholders, naming some of them, and a board of directors; and that it had been in existence six or seven years. Also, that it was operated as a corporation; but that last item of proof was stricken out on motion of the defendant. This question is discussed in People v.Struble, 275 Ill. 162, and we are of the opinion that the proof above indicated showed the exercise of corporate powers and functions, and met the requirements of the statute above quoted.

The defendant claims a variance between the description of the articles of property in the indictment and in the proof, and insists, without citing authority, that it was necessary to

was error. The judgment should [illegible] on
at which it should be in or and. Jim-son v. [illegible], [illegible] 111.
431. But if there [illegible] no other error in [illegible]
should be remanded for [illegible] evidence [illegible] v. [illegible],
272 Ill. 592,604, following Johnson v. [illegible], supra.

It is urged that [illegible] of [illegible] tions that the [illegible] on.
Section 486 of our criminal code [illegible] in
prosecutions involving [illegible] on the [illegible] evidence [illegible]
mer shall be [illegible] evidence. [illegible]
statute proof of [illegible] either [illegible]
domestic or foreign. [illegible] v. [illegible], 111 Ill. [illegible].
Proof of the defendant [illegible] by [illegible] or
otherwise, is [illegible]. [illegible] v. [illegible], 177 [illegible]. [illegible];
Graff v. [illegible], 208 Ill. [illegible]
people prove [illegible]
secretary, [illegible]
that there were stock[illegible]
directors; [illegible]
Also, that [illegible]
of proof [illegible]
question is [illegible]
ure of the [illegible]
exercise of [illegible]
ments or [illegible]

The [illegible]
of the article [illegible]
and that [illegible]

prove the description, quantity and price of each article as alleged, as for instance: the exact number of pounds of wire and the value per pound. It is elementary law that the number of articles charged to be stolen and the value thereof need not be proven unless it is matter of description. There must be proof that the articles have some value, but not necessarily the value alleged in the indictment. It is material whether the value of the articles were or not more than $15.00, but if found over or under that sum it is not material in what amount, and if the jury found the defendant guilty as to a part of the articles charged in the indictment, it was not necessary to support the judgment that the verdict should find him guilty as to the other articlescharged. McClaim on Criminal Law, Sec.723; Underhill on Criminal Evidence, Sec.298; Bishop's New Crim.Proc.Second Edition, Vol.2, page 406; and Vol.3, page 1674. Under the rule announced in these text books there was no variance between the allegations and proof in regard to the copper wire. It is not necessary to consider whether the proof failed as to some of the other articles. If, as the defendant contends, there was no proof of the receipt of the other articles; as for instance, the controller handle because it was not a controller handle but only pieces of metal when received, it only presents the familiar condition of an indictment sustained by proof of the taking of a part only of the property charged to be stolen, or received.

The witness Eisentrager was permitted to testify that he, before the time in question, repeatedly sold stolen property to the defendant, but as to these several transactions he did not expressly say that the defendant at the time knew he was purchasing stolen property. Defendant's counsel contend that under the

prove the description, quantity [illegible] price of [illegible] alleged, as for instance: the exact number of pounds [illegible] wire and the value per pound. It is elementary law that the number of articles charged to be stolen and the value thereof need not be proven unless it is matter of description. There must be proof that the articles have some value, but not necessarily the value alleged in the indictment. It is matter [illegible] whether [illegible] the articles were of not more than $15.00, but [illegible] found over or under it [illegible] not material in which event, [illegible] the jury found the defendant guilty as to a part of [illegible] articles charged in the indictment, it was not necessary to [illegible] that the judgment that the verdict should find him guilty [illegible] misdemeanor. Collins on Criminal Law, Sec.[illegible]; Underhill on Criminal Evidence, Sec.298; Bishop's New Crim.Proc.Second Edition, Vol. [illegible], page [illegible]; and Vol.8, page 1674. Under the rule announced in [illegible] there was no variance between the charge and the proof in regard to the copper wire. It is not necessary [illegible] the proof failed as to some of the other articles [illegible] contends, there was no proof of [illegible] articles; as for instance, [illegible] handle but only [illegible] the familiar [illegible] taking of a [illegible] received.

The witness [illegible] before the [illegible] the defendant, [illegible] did not expressly [illegible] stolen property. [illegible]

rule stated in People v Fryer, 266 Ill. 216, it was error to permit proof of other sales of stolen property unless it also appeared that the defendant knew at the time it was stolen. This may be so. The purpose of that character of testimony, when properly admitted, is to show the defendant's knowledge and intent. In the present case it appeared without contradiction that Eisentrager was, before the time in question, instructed by the defendant if he got any insulated copper wire to "burn it off so they cannot identify it." This undisputed testimony leaves no question that the defendant knew he was buying stolen property of the witness, and makes harmless any error in specific proof as to the various items that had been purchased before the time in question.

Defendant offered instructions which the court refused that there was no proof as to various items of property charged in the indictment. For reasons before stated it was not error to refuse those instructions.

Defendant's refused instruction No. 40 was on the question of reasonable doubt, and might properly have been given except that it was sufficiently covered by other instructions given on that subject. No. 41 was to advise the jury of the difference in measure of proof required in civil and criminal cases. It stated the law and might with propriety be given, but it was not error to refuse to inform the jury what the law is in civil cases. No. 43 was to tell the jury that in doubtful cases evidence of previous good character of the party charged with crime is conclusive in favor of the defendant. It is substantially the same as the instruction held properly refused in Guzinski v. The People, 77 Ill. App. 275. The rule is, as stated in that case, that evidence of good character

rule stated in People v Tryer, [illegible] Ill. 510, it was error to permit proof of other sales of stolen property on the ground that the defendant knew at the time it was stolen. [illegible] The purpose of that character of testimony, [illegible] is to show the defendant's knowledge or intent. In the present case it appeared without contradiction that a stranger [illegible] before the time in question, intimated by the [illegible] insulated copper wire to "burn it" [illegible] identify it." This undisputed testimony [illegible] the defendant knew he was buying stolen property [illegible] lessen any error in specific proof [illegible] been purchased before [illegible] in question.

Defendant's [illegible] instructions [illegible] that there was no proof as to various items [illegible] the indictment. For reasons [illegible] refuse those instructions.

Defendant's [illegible] of reasonable doubt, [illegible] it was sufficiently [illegible] subject. No. [illegible] measure of proof [illegible] the law and [illegible] refuse to instruct [illegible] was to tell the jury [illegible] good character of the defendant [illegible] of the defendant [illegible] held property [illegible] The rule is, [illegible]

is proper to be considered by the jury in connection with all the other evidence in the case in passing on the question of the guilt or innocence of the defendant. It was there said not to be the duty of the court to instruct the jury that if they have any doubt, however whimsical, it is their sworn duty to find the defendant not guilty if good character has been proved. If, independent of the evidence of good character, there is a reasonable doubt of the defendant's guilt, he should be acquitted. Evidence of good character may or may not be sufficient, when weighed with all the other evidence in the case, to raise a reasonable doubt in the minds of the jury of the defendant's guilt. If it does, he should be acquitted. If it does not, he should be convicted. There is little, if anything, to be gained by trying to separate that evidence from the other evidence to be considered by the jury. It cannot, in and of itself, as matter of law, be conclusive in favor of the defendant. The instruction was properly refused.

Complaint is made of the people's instructions. They were for the most part stock instructions many times given and approved, and no longer open to discussion. By the 9th given instruction the jury were told that if at the time the defendant received the property the circumstances presented and manifested to him were such as to have caused him, or any man of ordinary observation, "to know and to believe" and the defendant "did know and believe" that the property was stolen, etc., then it was not necessary that the defendant saw the goods stolen or was told that they had been stolen. The point made on this instruction is in the clause "know and believe", which is said to be illogical. Whatever else may be said of this criticism the language did not harm the defendant. The jury were required to find on that

is proper to be considered by the jury in connection with the other evidence in the case in passing on the question of the guilt or innocence of the defendant. It was there [illegible] not to be the duty of the court to instruct the jury that if they have any doubt, however whimsical, it is their sworn duty to find the defendant not guilty if good character has been proved. If, independent of the evidence of good character, there is a reasonable doubt of the defendant's guilt, he should be acquitted. Evidence of good character may or may not be sufficient, when coupled with all the other evidence in the case, to raise a reasonable doubt in the minds of the jury of the defendant's guilt. If it does, he should be acquitted. If it does not, he will be convicted. There is little, if anything, to be gained by trying to separate that evidence from the other evidence to be considered by the jury. It cannot, in any of itself, [illegible] be conclusive in favor of the defendant. The instruction [illegible] is perfectly correct.

Complaint [illegible] were for the [illegible] approved, and no [illegible] instruction [illegible] received the [illegible] to him were [illegible] observation, [illegible] and [illegible] necessary [illegible] that they [illegible] is in the [illegible] Whatever else may be [illegible] harm the defendant. The [illegible] to line on which

subject that he both knew and believed that the articles purchased were stolen property. We see no prejudicial error in that instruction. The instructions, as a whole, were more favorable to the defendant than he could properly ask, and we find no material error of the court in passing on any of them.

Defendant in his argument places great stress on the fact that the witness, Eisentrager, was a convicted thief; but his testimony was for the most part uncontradicted, and there was other credible, uncontradicted testimony in the case that clearly established the defendant's guilt. A reading of the ent re record leaves no doubt whatever that he was guilty as charged.

Finding no substantial error in the record up to the imposition of the sentence the judgment is reversed and the cause remanded to the circuit court with leave to the state's attorney to move for, and direction to the court to enter, a judgment in accordance with the rule established by the supreme court in The People v.Elliott, supra.

Reverged and remanded with directions.

subject that he both knew and believed that the articles purchased were stolen property. We see no prejudicial error in the instruction. The instructions, as a whole, were more favorable to the defendant than he could properly ask, and we find no material error of the court in passing on any of them.

Defendant in his argument lays great stress on the fact that the witness, Eigenbrodt, was a convicted thief; but his testimony was for the most part uncontradicted, and there was other credible, uncontradicted testimony in the case that clearly established the defendant's guilt. A reading of the entire record leaves no doubt whatever that he was a guilty man.

Finding no substantial error in the record up to the imposition of the sentence the judgment is reversed and the cause remanded to the circuit court with leave to the state's attorney to move for, and direction to the court to enter, a judgment in accordance with the mandate illustrated by the decision in the People v. Elliott, supra.

Reversed and remanded with directions.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____, in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on FEB 1 0 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6352. Agenda No. 26.

Sterling Wholesale Grocery Company, a Corporatinn, ~~Plaintiff~~, Appellee,

-vs- Appeal from Lee.

L. H. Risetter and J. W. Rhoads, partners doing business under the firm name and style of Risetter & Rhoads, Defendants.

CARNES, J.

This is a suit in assumpsit brought by appellee, Sterling Wholesale Grocery Company, a corporation, against L. H. Risetter, the appellant, and J. W. Rhoads, as partners, to recover $515.55 the price of merchandise alleged to have been sold and delivered to them. Rhoads defaulted. Risetter appeared and denied that there was a partnership or any liability as to him. There is no question as to the amount of the bill. A jury trial resulted in a judgment against both defendants on a verdict for the full amount, from which Risetter prosecutes this appeal.

It appears without dispute that Risetter is the son-in-law of Rhoads; that about June, 1914, a stock of goods in a store at Scarboro, Illinois, was purchased by Rhoads, or Risetter & Rhoads that Rhoads was an experienced merchant, and Risetter was not; that Risetter furnished the capital or most of it, and Rhoads attended to the business of buying and running the store. Risetter lived in the vicinity but is not shown to have done anything in the way of buying or selling goods or in the active management of the business affairs. Letter heads, bill heads, and sales slips were used bearing the firm name. Goods were ordered, shipped, and settled for, and advertising matter put out in that name, and

Gen. No. 6352. Agenda No. 26.

Sterling Wholesale Grocery
Company, a Corporation,
Plaintiff,

-vs- Appeal from Lee.

I. H. Riesetter and J. W.
Rhoads, partners doing business
under the firm name and style
of Riesetter & Rhoads,
Defendants.

CARMES, J.

This is a suit in assumpsit brought by appellee, Sterling Wholesale Grocery Company, a corporation, against I. H. Riesetter, the appellant, and J. W. Rhoads, as partners, to recover $ 15.55 the price of merchandise alleged to have been sold and delivered to them. Rhoads defaulted. Riesetter appeared and denied that there was a partnership or any liability on his part. There is no question as to the amount of the bill. A jury trial resulted in a judgment against both defendants on a verdict for the full amount, from which Riesetter prosecuted [illegible] appeal.

It appears that Rhoads die[illegible] in the store in Sourbore, Illinois, [illegible] Rhoads was in charge, or assisted in the store; that Riesetter furnished the capital or [illegible], and Rhoads attended to the business of buying [illegible] the store. Riesetter lived in the vicinity but [illegible] in the way of buying or [illegible] management of the business [illegible]. Let [illegible], bread, [illegible] alike were used [illegible] Rhoads were [illegible] and settled for, [illegible] Riesetter put out in his name, and

Risetter knew these facts. Appellee at different times from June 1914, to January 1916, furnished the goods in question to the store on orders in the name of Risetter & Rhoads, shipped and billed in that name, and sent statements of account and received checks in partial payment in that name. Risetter had in his house a calendar advertising the business in the name of Risetter & Rhoads.

One witness testified that during the time in question Risetter told himthhat he had an interest inthe store with Rhoads. Another that he heard Risetter say he had an interest in the store. Another that he was introduced by Rhoads to Risetter, who then stated that Risetter was interested in the business. Another that he herad Rhoads introduce Risetter to a traveling man, saying he was interested in the firm. L.B.Whiffin, the manager of appellee, testified that he was assisting in an invoice of the goods at the time they were taken over at Scarboro, and at that time Rhoads gave him an order for goods, and when asked who the goods should be shipped to stated in the presence of Risetter that the firm would be Risetter & Rhoads; that Risetter had the capital and he, Rhoads, had the experience. One A.E.Bennett, testified that he was present and heard that conversation between Rhoads and Whiffen. Each witness swears that Risetter was within hearing distance, and if he had normal hearing heard the conversation They each testify that he said nothing. (There is no evidence that he did not have normal hearing.) Risetter denies that he heard any such conversation between Rhoads and Whiffen, and denies the above mentioned statements by him, on in his presence that he had an interest in the business. We are of the opinion that the evidence compelled a finding by the jury that Risetter did hear

Ristter knew these facts. Appellee at different times from June 1914, to January 1916, furnished the goods in question to the store on orders in the name of Ristter & Rhoads, shipped and billed in that name, and sent statements of account and received checks in partial payment in that name. Ristter had in his house a calendar advertising the business in the name of Ristter & Rhoads.

One witness testified that during the time in question Ristter told him that he had an interest in the store with Rhoads. Another that he heard Ristter say he had an interest in the store. Another that he was introduced by Rhoads to Ristter, who then stated that Ristter was interested in the business. Another that he heard Rhoads introduce Ristter to a travelling man, saying he was interested in the firm. I.B.Whitten, the manager of appellee, testified that he was relating in an invoice of the goods at the time they were taken over at Searboro, and at that time Rhoads gave him an order for goods, and when asked who the goods should be shipped to stated in the presence of Ristter that the firm would be Ristter & Rhoads; that Ristter had the capital and he, Rhoads, had the experience. One A.A. Smoot, testified that he was present and heard that conversation between Rhoads and Whitten. Each witness swears that Ristter was within hearing distance, and if he had normal hearing heard the conversation They each testify that he said nothing. (There is no evidence that he did not have normal hearing.) Ristter denies that he heard any such conversation between Rhoads and Whitten, and denies the above mentioned statements by him, or in his presence that he had an interest in the business. We are of the opinion that the evidence compelled a finding by the jury that Ristter did hear

the conversation between Rhoads and Whiffen, did know that goods were to be furnished by appellee on the strength of that statement, and his financial responsibility, and that a contrary finding could not have been sustained. Unless there is substantial, prejudicial error of law there is no question that the judgment should be affirmed. A contrary judgment would have been so manifestly against the weight of the evidence as to require a reversal.

The court, at the instance of the plaintiff, instructed the jury that if Risetter voluntarily and knowingly allowed and permitted the business of the alleged firm of Risetter & Rhoads to be conducted in such a way as to reasonably justify the public generally, and persons dealing with the alleged firm, in believing that he was a member of the firm, and that the plaintiff before and at the time they sold the goods had reasomable grounds for believing, and did believe from the manner in which the business was conducted, that he was a member of the firm, then they had a right to hold him liable as a member of the firm. At the instance of Risetter he instructed the jury that he could not be held lieble for goods sued for unless he made some representation to the plaintiff, or committed some act, or failed to speak or act in such a way as to deceive the plaintiff and cause the plaintiff to have the reasonable belief that he was in fact a partner with Rhoads. Risetter asked an instruction to the effect that if he was not a partner and never held himself out or represented himself to be such partner, the verdict should be for the defendant, even though the jury should believe from the evidence that Rhoads, without the knowledge or consent of Risetter, represented to the plaintiff and others that Risetter was his partner and was jointly liable with him for bills that he might contract in the course of

the conversation between Rhoads and Whitten, did know that goods were to be furnished by appellee on the strength of that statement, and his financial responsibility, and that a contrary finding could not have been sustained. Unless there is substantial, prejudicial error of law there is no question that the judgment should be affirmed. A contrary judgment would have been so manifestly against the weight of the evidence as to require a reversal.

The court, at the instance of the plaintiff, instructed the jury that if Rissetter voluntarily and knowingly allowed and permitted the business of the alleged firm of Rissetter & Rhoads to be conducted in such a way as to reasonably justify the public generally, and persons dealing with the alleged firm, in believing that he was a member of the firm, and that the plaintiff before and at the time they sold the goods had reasonable grounds for believing, and did believe from the manner in which the business was conducted, that he was a member of the firm, then they had a right to hold him liable as a member of the firm. At the instance of Rissetter he instructed the jury that he could not be held liable for goods sold for which he made some representation to the plaintiff, or committed some act, or failed to speak or act in such a way as to deceive the plaintiff and cause the plaintiff to have the reasonable belief that he was in fact a partner with Rhoads. Rissetter asked an instruction to the effect that if he was not a partner and never held himself out or represented himself to be such partner, the verdict should be for the defendant, even though the jury should believe from the evidence that the sale, without the knowledge or consent of Rissetter, represented to the plaintiff and others that Rissetter was his partner was jointly liable with him for bills that he might contract in the course of

such business. The court modified and gave this instruction by inserting the qualification if Risetter did not knowingly allow and permit the business to be conducted in such a way as to reasonably justify the public generally, and persons dealing with the alleged firm, in believing that he was a member of the alleged firm, and refused instructions offered by the defendant to the effect that it was not material what Rhoads represented to the public, even with the knowledge of Risetter, if those representations did not reach the plaintiff and were not acted upon by them .

Appellant claims that even if he held himself out or permitted himself to be held out tobe the partner of Rhoads, that does not make him so in fact, or render him liable, as such, except as to those who were misled by such holding out, and who have extended credit on the strength of the supposed relation, citing 30 Cyc.384, and Hefner v Palmer, 67 Ill. 161; that it is immaterial what the community and general public may have believed and understood if the persons dealing with the alleged partners were not misled by their acts, citing Mellor v Carithers, 63 Ill.App. 579; and Thompson v First National Bank of Toledo, 111 U.S. 529. We agree with appellant in this construction of the law. It was correctly stated to the jury in appellant's given instruction above noted, and the jury could not have been misled by appellee's given instruction read in connection with that instruction. It was not error to refuse to repeat the instructions to that effect offered by appellant. The court should not have modified defendant's instruction as above noted. As modified it was inconsistent with the other instructions given. But as we are of the opinion, as before stated, that but one reasonable conclusion can be reached from the evidence, we are not inclined to reverse the judgment

such business. The court modified and gave this instruction by inserting the qualification if Masster did not knowingly allow and permit the business to be conducted in such a way as to reasonably justify the public generally, and persons dealing with the alleged firm, in believing that he was a member of the alleged firm, and refused instructions offered by the defendant to the effect that it was not material what Jacobs represented to the public, even with the knowledge of Masster, if those representations did not reach the plaintiff and were not acted upon by them.

Appellant claims that even if he held himself out or permitted himself to be held out to be the partner of Jacobs, that does not make him so in fact, or render him liable, as such, except as to those who were misled by such holding out, and who have extended credit on the strength of the supposed relation, citing 30 Cyc.384, and Hefner v Palmer, 67 Ill. 161; that in the instant case the community and general public may have believed the relation if the persons dealing with the alleged partners were not misled by their acts, citing Dalton v Dartmore, 63 Ill.App. 279; and Thompson v First National Bank of Toledo, 111 U.S. 5 S. . agree with appellant in this contention. It is correctly stated to the jury in the instruction above noted, and the jury could not be misled by Jacobs' given instruction read in connection with the instructions. It is not error to refuse to repeat the instruction asked by appellant. The court did not err in modifying the instruction as above noted. [illegible] it [illegible] but with the other instructions given. [illegible] before stated, that out of the [illegible] are excluded from the evidence, [illegible]

because of this error.

We see no substantial error in the rulings of the court on the evidence. While the evidence does not establish the allegation that Risetter was in fact partner as between him and Rhoads, yet that was an issue in the case upon which each party had a right to introduce testimony Of course, his own statements that he had an interest in the business were competent evidence, as were also the statements of Rhoads made in his presence, and also we think the acts of Rhoads in advertising and conducting the business in that name, so far as the evidence shows, that Risetter was familiar with what was done and acquiesced in it either by words or acts, or by silence at times when he would naturally be supposed to speak if he did not acquiesce in what Rhoads was doing.

Finding no reversible error in the record the judgment is affirmed.

Affirmed.

because of this error.

We see no substantial error in the rulings of the court on the evidence. While the evidence does not establish the allegation that Ricketter was in fact partner as between him and Rhoads, yet that was an issue in the case upon which each party had a right to introduce testimony. Of course, his own statements that he had an interest in the business were competent evidence, as were also the statements of Rhoads made in his presence, and also we think the acts of Rhoads in advertising and conducting the business in that name, so far as the evidence shows, that Ricketter was familiar with what was done and acquiesced in it either by words or acts, or by silence at times when he would naturally be expected to speak if he did not acquiesce in what Rhoads was doing.

Finding no reversible error in the record the judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6369. Ag. No. 38.

A. T. Scovill,
Appellant,
-vs- Appeal from Whiteside.
Albert C. Lange,
Appellee.

CARNES, J.

A bridge was washed out and destroyed August 2, 1915, on a State Aud Road leading south from Morrison, Illinois. Albert C. Lange, the appellee, was one of the highway commissioners of the township where it was located, and, as such commissioner, caused a temporary bridge to be made so that public travel would leave the highway about seventy or eighty feet south of the embankment of the old bridge and proceed to and across the temporary bridge. He caused a railing about twelve feet long and four feet high to be laced about ten feet south of the washout to prevent travelers from driving into the open space. This work was completed on August 9, and on the evening of that day, after dark, A. T. Scovill, the appellant, was driving his automobile north on that road at the rate of about fifteen miles per hour.. He did not see the railing and did not know of the washout until he was so near that he could not stop his car, and it struck the barricade, passed through it, and went into the ditch, injuring him. He brought this suit against appellee, as an individual, to recover for that injury, charging in his declaration that appellee, as highway commissioner, had charge of the road at the point in question and owed a duty to the public and the plaintiff to erect

Gen. No. 6569.

A. T. Scovill,
Appellant,
-vs-
Albert C. Lange,
Appellee.

Appeal from Kiteside.

GAEMES, J.

A bridge was washed out and destroyed [illegible], 1918, on a State Aid Road leading south from [illegible], Illinois. Albert C. Lange, the appellee, was one of the highway commissioners of the township where it was located, and [illegible] owner, caused a temporary bridge to be [illegible] to avoid leave the highway. Soon thereafter [illegible] south of the [illegible] - benchment of the old bridge [illegible] temporary bridge. He placed a [illegible] feet high to be [illegible] vent travelers from driving into [illegible] completed on [illegible] A. T. Scovill, the [illegible] that road at the [illegible] not see the [illegible] so near the [illegible] passed thereon [illegible] brought [illegible] for that injury, of [illegible] highway commissioner, and [illegible] question [illegible] to erect

sufficient barricades and signs of danger to prevent accidents; that he failed to perform that duty, and "because of gross negligence and carelessness on the part of defendant" the plaintiff was injured, etc. The general issue was plead, and at the close of the plaintiff's evidence the court, on motion of the defendant, directed a verdict of not guilty. Judgment was entered thereon, from which this appeal is prosecuted.

The court stated in ruling on the motion to direct the verdict that it was based on two contentions: First, That the highway commissioners have no jurisdiction over State Aid Roads and no duty to keep them in repair. Second, That even conceding such jurisdiction and duty to care for State Aid Roads in cases of emergencies like this, still the defendant was not shown guilty of any actionable negligence. The court said he did not agree with the defendant's first suggestion, but as to the second was of the opinion on the authority of Nagle v.Wakey, 161 Ill. 387, that the defendant, as highway commissioner, was required only to use his judgment as to the manner of protecting travelers from danger from the opening; that reasonable men might differ as to the manner of protection; Fifty men might have fifty different judgments as to what would be proper to do; that good judgment, considering modern modes of travel, might require that the barrier should be farther away from the opening, but if the defendant used the best judgment he possessed and acted in good faith there could be no recovery; that unless it was conceded by the plaintiff that the defendant was using his best judgment and acting in good faith on the matter he would put that question to the jury; that if the plaintiff would say that he did not claim that the defendant did not exercise the best judgment he possessed, or that he did not act honestly, then the motion would be

sufficient barricades. [illegible] to relevant [illegible]; that he failed to perform that duty, [illegible] of [illegible] negligence and carelessness on the part of [illegible] injured, etc. The general issue was [illegible] of the [illegible] evidence the court, on motion of [illegible], directed a verdict of not guilty. Judgment [illegible] on [illegible] is prosecuted.

The court stated in ruling on the motion to direct the verdict that it was based on two contentions: first, that the highway commissioners have no jurisdiction over [illegible] and no duty to keep them in repair. Second, [illegible] jurisdiction and duty to care for [illegible] like it is, still the defendant [illegible] negligence. The court said [illegible] first sub-section, [illegible] authority of [illegible] v. [illegible], [illegible] highway commissioner, [illegible] the manner of protecting travelers [illegible]; that reasonable men might [illegible] Fifty men might [illegible] proper to do; [illegible] might require [illegible] ing, but [illegible] noted in good faith [illegible] conceded by the [illegible] judgment and action [illegible] question to the jury; [illegible] not claim it [illegible] possessed, or the [illegible]

sustained; that he wanted the record to clearly show whether any such claim was made by the plaintiff; whereupon it was admitted by the plaintiff that the defendant would testify that he used his best judgment, and that the plaintiff had no evidence to rebut that position except what was already in. Following this statement the court directed the verdict.

We will assume appellant's first position that appellee, as road commissioner, was, notwithstanding the Tice law, charged with a duty to look after this road in this emergency without discussing or deciding that question, and proceed to the inquiry whether the court erred in directing a verdict for the defendant on the ground that there was no actionable negligence shown. This court, speaking through Justice Cartwright in Nagle v.Wakey, 59 Ill. App. 198, said- " Whether an action will lie against commissioners of

> highways for damages resulting to an individual from the manner in which they have discharged their official duty to the public on the ground that it was not discharged with reasonable prudence and skill, has not been settled in this state by any decision of the supreme court."

That question was then discussed with reference to many authorities. Tearney v.Smith, 86 Ill. 391 (relied on here by appellant) was distinguished and said not to be an authority "that an individual may sue where the only right is in the general public", and the conclusion was reached that highway commissioners are only required to exercise their judgment and discretion in repairing and improving the roads and bridges of the towns,"and when the public have had a fair and honest exercise of that judgment and discretion they have got all that we think they are entitled to. It would be against reason to elect commissioners to use their best judgment and then sue them for doing it." On appeal that opinion was adopted by the supreme court. (161 Ill. 387) There was a dissenting opinion

sustained; that he wanted the reason [illegible] such claim was made by the [illegible] instructed by the plaintiff that the [illegible] judgment, and that the plaintiff had no [illegible] tion except what was already in. [illegible] court directed the verdict.

We will [illegible] road commissioner, was, notwithstanding the [illegible] a duty to look after this road in the emergency [illegible] or deciding that question, and proceed to [illegible] court erred in directing a verdict on the [illegible] that there was no actionable negligence [illegible] speaking through Mr. [illegible] 198, said:- "[illegible]

[illegible]

That question was then [illegible] Tourney v. Smith, 86 Ill. [illegible] distinguished [illegible] may and will be [illegible] conclusion [illegible] to exercise [illegible] the roads and bridges [illegible] fair and honest [illegible] got all the [illegible] reason to elect [illegible] due them for [illegible] the supreme court. [illegible]

and it appears that there is some conflict of authority in the American States on the question there decided, but it left the law settled in this state. This court held in Neville v Viner, 115 Ill. App. 364, that highway commissioners are not liable in an action for injuries resulting to an individual from the manner in which they have discharged their official duties to the public, even if there is proof from which the jury might find that such duties were not discharged with reasonable prudence and skill, and said the very strong dissent in Nagle v Wakey, 161 Ill. 387, only emphasizes the distinctness with which the court there laid down that doctrine. The same principle is announced in Pearl v.King, 179 Ill. App. 562. The court there said;- " If in a suit brought

> against them for damages occasioned by wilful failure on their part to perform their duties highway commisioners must sustain their judgment as to the best means of repairing a road by the weight of the evidence, few, if any, men possessed of any property would be willing to imperil it by voluntarily accepting the office of commissioner with its attendant hazards. "

Appellant cites authority and assumes positions that might call for much consideration and discussion in the absence of the Illinois cases above cited. Those cases are controlling here, and practically every suggestion made by appellant is found there discussed and decided. It would serve no good purpose to extend this opinion by a repetition of what can there be read.

We conclude that even on appellant's assumption that appellee was, as commissioner, charged with a duty to act in the emergency, still the evidence did not show or tend to show any actionable negligence in so doing; therefore the judgment is affirmed.

Affirmed.

and it appears that there is some conflict of authority in the American States on the question there raised, but it left the law settled in this state. This court held in Neville v. Tyler, 112 Ill. App. 364, that highway commissioners are not liable in an action for injuries resulting to an individual from the manner in which they have discharged their official duties to the public, even if there is proof from which the jury might find that such duties were not discharged with reasonable prudence and skill, and said the very strong dissent in Hagle v Wakey, 161 Ill. 397, only emphasizes the distinctness with which the court there laid down that doctrine. The same principle is announced in Kent v. King, 179 Ill. App. 561. The court there said:- " If in a suit brought against them for damages occasioned by willful failure on their part to perform their duties highway commissioners must sustain their present as to the best mainmore of repairing a road by the weight of the evidence, means of repairing a road by the weight of the evidence, tion, if any, can possessed of any property would be willing to impeach it by voluntarily accepting the office of commissioner with its burdens and hazards."

Appellant cites authority [illegible] conditions [illegible] must be [illegible] for much consideration and legislation in the [illegible] of the Illinois cases above cited. Those cases are controlling here, and practically every [illegible] by [illegible] found there dis- cussed and decided. It would serve no good purpose to extend [illegible] opinion by a repetition of what has been [illegible].

We conclude that even on [illegible] the [illegible] was, as commissioner, charged with [illegible] still the evidence did not show or tend [illegible] negligence in so doing; therefore [illegible].

[illegible]

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____.

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Fred Rose, by his next friend,
Defendant in Error,
-vs- Error to Lake.
Helen Morton,
Plaintiff in Error.

DIBELL, J.

Fred Rose, a minor, by his next friend, sued Helen Morton in an action on the case, and on the trial had a verdict for $2000, nd plaintiff, in obedience to the suggestion of the court, remitted $1,000 and had a judgment for $1,000, and defendant brings the record to this court for review.

The only part of the declaration which went to the jury was the first count. It alleged that defendant at the time of the accident in question possessed a wild, vicious and spirited horse, which disposition she well knew; that she directed said plaintiff to mount and drive said horse; that plaintiff had no knowledge of the vicious, wild and unruly disposition and habits of said horse, and that defendant negligently failed to warn and instruct him concerning the same; that plaintiff,with due care for his own safety, mounted and backed said horse in obdience to thedirection of the defendant, and while endeavoring to back the horse, as instructed by defendant, through the negligence of defendant, said horse on account of his wild, vicious and untrained condition, reared and plunged about so that plaintiff was thrown and his left leg was broken, and he was wounded and suffered great pain, and was permanently injured, and was deprived of the gains and profits which he might have made, etc.

Fred Rose, by his next friend,
Defendant in Error,

-vs- Error to Lake.

Helen Morton,
Plaintiff in Error.

DIRELL, J.

Fred Rose, a minor, by his next friend, sued Helen Morton in an action on the case, and on the trial he recovered for $2000, and plaintiff, in obedience to the suggestion of the court, remitted $1,000 and had judgment for $1,000, and defendant brings the record to this court for review.

The only part of the declaration which went to the jury was the first count. It alleged that defendant at the time of the accident in question possessed a wild, vicious and spirited horse, which disposition she well knew; that she directed said plaintiff to mount and drive said horse; that plaintiff, in ignorance of the vicious, wild and unruly disposition and habits of said horse, and that defendant negligently failed to warn and instruct him concerning the same; that [illegible] the care for his own safety, mounted [illegible] in obedience to the direction of the defendant, and [illegible] endeavoring to drive the horse, as instructed by defendant, the said horse, by reason of defendant's negligence, said horse on account of his wild, vicious and untrained condition, reared and plunged [illegible] plaintiff was thrown and his left leg was broken, and he was wounded, he suffered great pain, and was permanently injured, and was deprived of the gains and profits which he might have made, etc.

Defendant pleaded not guilty. The jury not only found the issues for the plaintiff but also in answer to requests by defendant for a special verdict found specially that the horse in question was vicious, wild and of an unruly disposition and habits; that the defendant knew these facts, and that she ordered plaintiff to ride and drive said horse,

The proof shows that the animal was a blooded mare named Rosadora; that she had a very tender mouth; that she was accustomed to rear up on her hind legs whenever the bits were pulled; that defendant had ridden her when she so reared up and had been present at other times when she so reared up; that on August 30, 1911, defendant was riding said horse on a course at the Onwentsia Club at Lake Forest; that she was training the mare for some purpose connected with an exhibition or display that was soon to be had there; that she tried to back the mare and could not; that other people before that had failed in efforts to back her; that plaintiff was standing near by, and plaintiff and defendant were not acquainted with each other; that plaintiff was less than sixteen and one half years old and had never noticed this mare before; that defendant called plaintiff to the mare and told him to back her and he took hold of the reins at the bits and tried to back her and failed; that defendant then got off the mare and told plaintiff to get on and back her; that the mare had on a double bitted bridle with a safety bit and a curb bit and a line to each, and that it was known to those who handled the mare that if the curb bit was pulled she would rear up; that plaintiff was not acquainted with that kind of a bit and knew nothing about

Defendant pleaded not guilty. The jury not only found the issues for the plaintiff but also in answer to requests by defendant for a special verdict found specially that the horse in question was vicious, wild and of an unruly disposition and habits; that the defendant knew these facts, and that she ordered plaintiff to ride and drive said horse.

The proof shows that the animal was a blooded mare named Roseadore; that she had a very tender mouth; that she was accustomed to rear up on her hind legs whenever the bits were pulled; that defendant had ridden her when she so reared up and had been pleased at other times when she so reared up; that on August 30, 1911, defendant was riding said horse on the course of the Ownentaia Club at Lake Forest; that she was training the mare for some purpose connected with an exhibition or display that was soon to be had there; that she tried to break the mare and could not; that other people before that had tried in vain to break her; that plaintiff was standing near by, and defendant were not acquainted with each other; that [illegible] less than sixteen and one half years old, [illegible] noticed this mare before; that defendant [illegible] and told him to back her. [illegible] the bits and tried to back her and failed; that defendant [illegible] the mare and told plaintiff to get on and back her; that the mare had on a double bitted bridle with [illegible] bit and a bit and line to each, and that it was known to [illegible] handled the mare that if the curb bit was pulled she would rear up; that plaintiff was not acquainted with that kind of a bit [illegible] nothing about

the disposition of the animal; that he got upon the mare pursuant to defendant's direction and tried to back her by pulling upon the bits and the mare reared up and fell over backwards and broke plaintiff's leg. It would serve no useful purpose to indicate the different witnesses by whom this proof was made. It is substantially uncontradicted. We are of opinion that it makes a case for plaintiff. Defendant now claims that the declaration should have alleged that the animal was accustomed to rear up. No claim of variance was made during the trial, and we hold the declaration good after veerdict. It is argued that there is no proof of scienter, but we find that proof in the record, as above stated . We think it evident that it was negligence for defendant to direct this boy to mount this spirited animal for the purpose of doing what she was unable to do. It is said the damages are excessive. Plaintiff was in a hospital for some eight weeks, wearing splints. Thereafter he wore a plaster cast for two or three weeks while he was in bed at home. He walked on crutches for a time. The surgeon who attended him testified that both bones of the left leg were broken and that there was a good recovery, but that there was a little restriction in freedom of motion of the knee, common to all fractures and due to the length of time the leg remained in a cast. At the time of the trial, more than two and one-half years after the accident, plaintiff testified that he occasionally suffered pain at the place of the fracture, which was between the knee and the ankle. We are of opinion that the judgment is not excessive.

Defendant introduced an affidavit, sworn to by plaintiff before one Arthur J.Dixon, giving his version of how the accident

the disposition of the animal; that he got upon the mare pursuant to defendant's direction and tried to hold her by pulling upon the bits and the mare reared up and fell over backwards and broke plaintiff's leg. It would serve no useful purpose to indicate to the different witnesses by whom this proof was made. It is substantially uncontradicted. We are of opinion that it makes a case for plaintiff. Defendant now claims that the declaration should have alleged that the animal was accustomed to rear up. No claim of variance was made during the trial, and we hold the declaration good after verdict. It is argued that there is no proof of scienter, but we find that proof in the record, as above stated. We think it evident that it was negligence for defendant to direct this boy to mount this spirited animal for the purpose of doing what she was unable to do. It is said the damages are excessive. Plaintiff was in a hospital for some one's weeks, wearing splints. Thereafter he wore a plaster cast for two or three weeks while he was in bed at home. He walked on crutches for a time. The surgeon who treated him testified that both bones of the left leg were broken and that there [illegible] good recovery, but that there was a little restriction [illegible] motion of the knee, common to [illegible] of time the leg remained in a cast. At [illegible] more than two and one-half years after [illegible] testified that he occasion[illegible] fracture, which was between [illegible] opinion that [illegible] judge [illegible] not excessive.

Defendant introduced an alibi-vit, [illegible] plaintiff before one Arthur [illegible], giving his version [illegible] how the accident

happened. In rebuttal plaintiff called Dixon and ascertained that he was in the employ of Frank J. Cantor, and that Cantor was an attorney for the London Guarantee and Accident Company, and inquired if he took that affidavit as the representative of the company, and he said he did not; that Mr.Cantor paid him and that he thought that Mr.Cantor represented Mr.Morton, the father of defendant, but that he did not know. All this was eli cited without any objection by defendant. Dixon was then asked if in fact the money paid him by Cantor was not paid by said accident company. An objection by defendant to that question was sustained. Defendant contends that this was an effort to induce the jury to believe that defendant was protected by insurance, and that this was improper evidence for which the case should be reversed. It has been held many times by the supreme and appellate courts of this state that such evidence is not admissible and that it is reversible error to develop the fact that an insurance company is responsible and not the defendant. We think this objeation should not prevail here for the reason that the roof shows that the accident company had nothing to do with this claim or suit, and that the matter supposed to be erroneous was not objected to by defendant, and that, if any harm was done, it was cured by the remittitur of one-half of the verdict.

The judgment is therefore affirmed.

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The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

2373

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

204 I.A. 124

BE IT REMEMBERED, that afterwards, to-wit: on 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6332.

The People of the State of Illinois

Defendant in error.

vs Error to Co. Ct. Lake.

Otto Wallin, Plaintiff in error.

Dibell, J.

Otto Wallin brings before us for review a judgment of the court below upon a conviction by a jury under fifteen counts of an information charging him with a violation of the act concerning anti-saloon territory. He was fined an aggregate of $1,150. and sentenced to imprisonment for thirty days in the county jail. The main contentions of defendant are disposed of adversely to him in People v McCanney, Gen. No. 6331, in which we file an opinion this day.

To find in the proof fourteen sales of intoxicating liquor, it is necessary to count eight drinks of buck, which the detectives testified was a malt liquor. The last sales proved were on June 6. The chemist for the State was not furnished i with buck to analyze in this case, but only cider. Defendant testified not only that the buck he sold was not a malt liquor but also that he had no buck at that place till June 10, when he first bought it. He proved by the person from whom he bought it that he first sold buck to defendant on June 10. We conclude the jury were not warranted in finding that it was proved by the evidence beyond a reasonable doubt that the detectives drank buck in that place. As there was not proof of enough sales of cider with alco in it to support a conviction under more than half the counts, the judgment must be reversed. The People seek to sustain the conviction under all the counts by the testimony of the defendant as to what he sold, but his

Gen. No. 8332.

The People of the State of Illinois
Defendant in error.

vs. Error to Co. Ct. Lake.

Otto Wallin, Plaintiff in error.

Dibell, J.

Otto Wallin brings before us for review a judgment of the court below upon a conviction by a jury under fifteen counts of an information charging him with a violation of the act concerning anti-saloon territory. He was fined an aggregate of $1,150. and sentenced to imprisonment for thirty days in the county jail. The main contentions of defendant are disposed of adversely to him in People v. McCannon, Gen. No. 8331, in which we file an opinion this day.

To find in the proof fourteen sales of intoxicating liquor, it is necessary to count eight drinks of buck, which the detectives testified was a malt liquor. The last sales proved were on June 6. The chemist for the State was not furnished i with buck to analyze in this case, but only cider. Defendant testified not only that the buck he sold was not a malt liquor but also that he had no buck at that place till June 10, when he first bought it. He proved by the person from whom he bought it that he first sold buck to defendant on June 10. We conclude the jury were not warranted in finding that it was proved by the evidence beyond a reasonable doubt that the detectives drank buck in that place. At least was not proof of sufficiently sales of cider with also in it to support a conviction under more than half the counts, the judgment must be reversed. The People seek to sustain the conviction under all the counts by the testimony of the defendant as to what he sold, but his

language on that subject covered all the time down to the trial of the case, which was more than a month later. We cannot therefore assume that his testimony would support an information filed on June 19. It seems to be assumed by counsel that we can affirm the judgment under certain counts and reverse it under other counts, reliance being had on Grom v People, 135 Ill. App. 453. We did so hold in that case and also in Gaul v People 136 Ill. App. 445, but our judgment in the latter case was reversed in People v Gaul, 233 Ill. 630, and it was there held that in such a case we must either reverse or affirm the entire judgment.

The judgment is therefore reversed and the cause remanded.

language on that subject covered all the time down to the trial of the case, which was more than a month later. We cannot therefore assume that his testimony would support an information filed on June 19. It seems to be assumed by counsel that we can affirm the judgment under certain counts and reverse it under other counts, reliance being had on Grom v People, 155 Ill. App. 455. We did so hold in that case and also in Gaul v People 155 Ill. App. 445, but our judgment in the latter case was reversed in People v Gaul, 233 Ill. 230, and it was there held that in such a case we must either reverse or affirm the entire judgment.

The judgment is therefore reversed and the cause remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

AT A TERM OF THE APPELLATE COURT

begun and held at Ottawa, on Tuesday, [illegible]

in the year of our Lord one [illegible]

within and for the Second [illegible]

Present--The Hon. JOHN M. [illegible]

Hon. DUANE L. [illegible]

Hon. DONRANCE [illegible]

CHRISTOPHER C. [illegible]

E. M. DAVIS, [illegible]

BE IT REMEMBERED, [illegible]

the Clerk's office [illegible]

following, to-wit:

6341. 18/

Federal Rubber Manufacturing Company,
Appellant,
-vs-
Plow City Garage,
Appellee.

Appeal from county court of Rock Island.

DIBELL, J.

Appellant sued appellee upon a bill for automobile tires and tubes, on which $100 had been paid, leaving a balance of $253.31 unpaid. Defendant filed the genaral issue and a plea of recoupment, which set up a certain warranty of the goods and that the goods were not as warranted and that appellee's lossby reason of the breach of warranty was equal to the amount remaining unpaid. After a demurrer to the plea was sustained, it was stipulated that this defence might be admitted under the general issue. A jury was waived, the cause was tried, and appellant had a judgment for $168.99, which, disregarding any question of interest, was a reduction of $84.32 for the breach of warranty. Plaintiff below appeals and claims the judgment should have been for the full amount of his bill, and appellee assigns cross errors and claims its damages should have been assessed at the full amount remaining unpaid.

Appellee proved an express oral warranty made by the agent who took the order for the goods, and proved that the goods were not as warranted. Appellant insists that the written order for the goods was the contract between the parties, and that, as that order contained no warranty, there was only the warranty

6341. 181

Federal Rubber Manufacturing
Company,
Appellant,

-vs-

Appeal from County Court
of Rock Island.

Flow City Garage,
Appellee.

DIRECT, J.

Appellant sued appellee upon a bill for automobile tires and tubes, on which $100 had been paid, leaving a balance of $253.31 unpaid. Defendant filed the general issue and a plea of recoupment, which set up a certain warranty as to the goods and that the goods were not as warranted and that appellee's loss by reason of the breach of warranty was equal to the amount remaining unpaid. After a demurrer to the plea was sustained, it was stipulated that this defense might be admitted under the general issue. A jury was waived, the cause was tried, [illegible] appellant had a judgment for $158.99, which, disregarding any question of interest, was a reduction of $94.32 for the breach of warranty. Plaintiff below appeals and claims the judgment should have been for the full amount of his bill, [illegible] making good errors and claims its damages should [illegible] be [illegible] the full amount remaining unpaid.

Appellee proved an express verbal warranty [illegible] who took the order for the goods, [illegible] were not as warranted. Appellant in [illegible] the written order for the goods was the contract between the parties, and that, as that order contained no warranty, there was only the warranty

which the law implies, and that the previous verbal warranty was cut off by the written order; and also that it is not sufficiently proved that the agent had power to make such a warranty. The general rule is that in making such a sale, the agent is authorized to do whatever is usual in carrying out the object of his agency, and that, it if is usual to give a warranty, the agent may give such a warranty in order to effect a sale, and that what is usual is a question of fact. 2 Benjamin on Sales, 6th Am.Ed. Sec.945; Woodford v McClenahan, 4 Gilm. 85; 31 Cyc 1354. In order to raise the question whether this written order avoided the previous verbal warranty it was necessary that the order should be in evidence. Appellant called as a witness the president and manager of appellee and proved by him his signature to the order and then offered theorder. It appears that there were many endorsements and alterations upon it and for that reason the offer was objected to. The court held that it would be admitted as to such matters as were on the order with the approval of the president of appellee who signed it, and that it would not be admitted as to the other matters on the order. Appellant did not then show what matters had been placed there by the president's approval and what had since been added, but instead the parties stipulated that all the goods set out in the copy of account sued on were ordered and received and that the prices were correct. It therefore seems that the order was not in fact in evidence and there is nothing on which to base the claim that the verbal warranty was avoided by the subsequent written order. But, further, the rule that a written contract of sale avoids a prior verbal warranty has no application where the writing is only an order for the goods. 35 Cyc. 380. Therefore appellant's contentions against the verbal

which the law implies, and that the previous verbal warranty was cut off by the written order; and also that it is not sufficiently proved that the agent had power to make such a warranty. The general rule is that in making such a sale, the agent is authorized to do whatever is usual in carrying out the object of his agency, and that, if it is usual to give a warranty, the agent may give such a warranty in order to effect a sale, and that what is usual is a question of fact. 2 Benjamin on Sales, 6th Am.Ed. Sec.945; Woodford v McClenahan, 4 Gilm. 83; 31 Ore 135. In order to raise the question whether this written order avoided the previous verbal warranty it was necessary that the order should be in evidence. Appellant called as a witness the president and manager of appellee and proved by him his signature to the order and then offered the order. It appears that there were many endorsements and alterations upon it and for that reason the offer was objected to. The court held that it would be confined as to such matters as were on the order with the signature of the president of appellee who signed it, and that it was not admitted as to the other matters on the order. The appellant did not show that matters had been placed there by the [illegible] and what had since been added, but insisted that [illegible] that all the goods set out in the copy [illegible] were ordered and received and that the prices were correct. It therefore seems that the order was [illegible] nothing on which to base the [illegible] was avoided by the subsequent written order. But, [illegible] that a written contract of sale [illegible] any has no application where the writing is only a memorandum of goods. 38 Ore. 380. Therefore appellant's contention that the verbal

warranty have no foundation. There was no proof to dispute the warranty nor its breach.

We are asked by appellant to decide that no damages should have been allowed to appellee in recoupment, but the proofs clearly established that damages should have been allowed. We are asked by appellee to hold that the damages should have been allowed to the full amount unpaid on the bill. We cannot reverse this case on either of these grounds for the reason that the evidence is not all before us. Five of the tires were brought into court and offered in evidence and received without objection; and the bill of exceptions specially recites that the court made an examination of the tires. Those tires have not been certified to this court. No photographs of them were taken and inserted in the record, so that we could see, at least in part, what the court saw. No witness described the condition of those five tires. The conclusion of the trial court may have turned upon what he saw of the condition of those tires. Appellee relies upon the absence of these tires from this court to prevent a reversal on the ground that too large a sum was allowed as damages. But they have an equal effect to prevent our reversing on the ground that larger damages should have been allowed. Appellee retains the property sold to it, and in this state of the record we must assume that the decision of the trial court on the facts was correct.

Many propositions of law were offered by the parties. Some were given and some were refused for each. Each side concedes that the court erred in its rulings against that party on these propositions. Probanly they are not wholly consistent or correct, but, as it appears to us that substantial justice has been done upon the facts, we are of opinion we ought not to reverse on either

warranty have no foundation. There was no proof to dispute the warranty nor its breach.

We are asked by appellant to decide that no damages should have been allowed to appellee in recoupment, but the proofs clearly established that damages should have been allowed. We [illegible] by appellee to hold that the damages should [illegible] allowed to the full amount unpaid on the bill. We cannot reverse this case on either of these grounds for the reason that the evidence is not all before us. Five of the tires were brought into court and offered in evidence and received without objection; and the bill of exceptions specifically recites that the [illegible] made examination of the tires. Those tires have not been certified to this court. No photographs of them were [illegible] in the record, so that we could see, [illegible] what the court saw. No witness described the condition of those five tires. The conclusion of the trial court may [illegible] of the condition of those tires. [illegible] of those tires from this court to prevent [illegible] that too large a sum was allowed [illegible] equal effect to prevent our reversing on the [illegible] damages should have been allowed. [illegible] hold to it, and in this at be of the [illegible] the decision of the trial court on the facts [illegible].

Many propositions [illegible] were given and some were refused for error. [illegible] that the court erred in its rulings [illegible] propositions. Probably they are not strictly correct, but, as it appears to us that substantial justice has been done upon the facts, we are of opinion we ought not to [illegible] on either

errors or cross-errors assigned on the propositions of law. Under the circumstances we think it would serve no useful purpose to discuss them.

The judgment is therefore affirmed.

errors or cross-errors assigned on the propositions of law. Under the circumstances we think it would serve no useful purpose to discuss them.

The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 13th day of September, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the sixth day of April, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE L. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the [illegible] of September, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6347

Ira J. St. Onge, et al

appellees.

vs Appeal from Rock Island.

Spri gfield Fire and Marine

Insurance Company.

appellant.

Dibell, J.

This suit is by the same plaintiffs as St. Onge et al vs Hartford Fire Insurance Company, Gen. No. 6346, in which we file an opinion this day, and concerns the same stock of merchandise and the same fire loss as that case, and has the same attorneys on both sides in this court, and was tried shortly after the Hartford case and on substantially the same evidence, and most of the questions here arising are the same that we discussed in the opinion in that case, and we refer to that opinion for a disposition of most of the questions here involved This suit resulted in a verdict and judgment for plaintiffs for $2,266.66, the verdict specifying that the interest was $266.66. The policy here sued upom is the one described in the opinion in the Hartford case as the Springfield policy. Defendant below appeals.

The policy sued on, in describing the property insured, contained the following: "$3000 on stock of merchandise, consisting principally of dry goods, groceries and shoes, and other merchandise not more hazardous, such as is usually kept for sale in a small town general store." Then followed a second item on fixtures, not filled out. Then was described the location of the building. Then was the following: "Total concurrent insurance permitted as follows: On first item above named, $_____. On second item, $_____."

Gen. No. 8347

Ira J. St. Onge, et al

appellees.

vs

Appeal from Rock Island.

Spring Field Fire and Marine

Insurance Company.

appellant.

Dibell, J.

This suit is by the same plaintiffs as St. Onge et al vs Hartford Fire Insurance Company, Gen. No. 8346, in which we file an opinion this day, and concerns the same stock of merchandise and the same fire loss as that case, and has the same attorneys on both sides in this court, and was tried shortly after the Hartford case and on substantially the same evidence, and most of the questions here arising are the same that we discussed in the opinion in that case, and we refer to that opinion for a disposition of most of the questions here involved. This suit resulted in a verdict and judgment for plaintiffs for $3,388.88, the verdict specifying that the interest was $388.88. The policy here sued upon is the one described in the opinion in the Hartford case as the Springfield policy. Defendant below appeals.

The policy sued on, in describing the property insured, contained the following: "$3000 on stock of merchandise, consisting principally of dry goods, groceries and shoes, and other merchandise not more hazardous, such as is usually kept for sale in a small town general store." Then followed a second item on fixtures, not filled out. Then was described the location of the building. Then was the following: "Total concurrent insurance permitted as follows: On first item above named, $_____. On second item, $_____."

The policy also contained the following: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid of not, on property covered in whole or in part by this policy." The declaration alleged that this last clause was left in the policy by mistake and inadvertance of the agent who wrote the policy, and that at the time said policy was issued appellant knew that appellees had and intended to keep till its expiration the Hartford policy, (describing it,) and that appellees desired to have and continue in force other insurance policies of other companies covering said property, and that on February 3, 1913 and on February 27, 1913, appellees, with the full knowledge and acquiescence and consent of appellant, took out and procured a policy of insurance in the Assured's National Mutual Fire Insurance Company for the sum of $2000. and in the Hartford Insurance Company in the sum of $2000 which were, with the policy here sued on, in full force and effect at the time of the loss by fire in question, and that when appellant's policy was executed it was not the intention and agreement of the parties that appellees should not have the right to carry other insurance on said property, but it was the intention understanding and agreement between the parties that they should have such right, and that appellant, by its knowledge, acquiescence and agreement, waived said conditions, and consented to other insurance; and that appellees, up to the time of the fire, had not read and did not know that said condition against other insurance was in said policy, but relied on the intent and agreement that they might have other insurance on said property, and on appellants knowledge thereof; that appellant's agent had written said Hartford policy, and had in his custody said policies, and appellees understood and believed that appellant's

The policy also contained the following: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." The isolation alleged that this last clause was left in the policy by mistake and inadvertence of the agent who wrote the policy, and that at the time said policy was issued a pe last knew that appellees had and intended to keep till its expiration the Hartford policy, (describing it,) and that appellees desired to have and continue in force other insurance policies of other companies covering said property, and that on February 3, 1913 and on February 27, 1913, appellees, with the full knowledge and acquiescence and consent of appellant, took out and procured a policy of insurance in the Assured's National Mutual Fire Insurance Company for the sum of $2000, and in the Hartford Insurance Company in the sum of $2000 which were, with the policy here sued on, in full force and effect at the time of the loss by fire in question, and that when appellant's policy was executed it was not the intention and agreement of the parties that appellees should not have the right to carry other insurance on said property, but it was the intention understanding and agreement between the parties that they should have such right, and that appellant, by its knowledge, acquiescence and agreement, waived said conditions, and consented to other insurance; and that appellees, up to the time of the fire, had not read and did not know that said condition [illegible] other insurance was in said policy, but relied on [illegible] and agreement that they might have other insurance [illegible] said property, and on appellants knowledge thereof; that [illegible] agent had written said Hartford policy, and had in [illegible] customary said policies, and appellees understood and believe that appellant's

policy permitted other insurance. The policy here sued on was dated December 23, 1912, and ran from that date to December 23, 1913. At that time a Hartford policy was on the property and in the possession of appellant's agent at his bank and in his office, and subsequently it was renewed by the policy sued on in the other case, dated and in force February 27, 1913, for one year. The fire was in the night of Sunday, April 13, 1913. St. Onge had no perfectly safe place in which to keep his policies and his Hartford policy then in force was in the vaults of R. P. Wait, the agent of appellant, and this policy was issued by directions by telephone, and was placed in said vault and was never seen by appellees till after the fire. As appellant's agent issued this policy with knowledge that another policy upon the same property was already in force, and did not refuse to issue this policy, or notify assured that the policy we was issuing would immediately be void because the other insurance was outstanding, we think it clear that appellant's agent understood and meant, by delivering this policy with the provisions above quoted, to permit additional concurrent insurance, without placing a limit upon the amount thereof. Any other construction of the policy would make it a fraud upon the insured to have issued it, and the fraud of appellant's agent in issuing it would also be the fraud of appellant. Afterwards the policy referred to in our opinion in the Hartford case as the Assured policy was issued by another agent, and appellant here claims that the issuing of that policy invalidated the policy here sued upon. We are of opinion that it did not, both because we interpret the policy here sued on to permit additional concurrent insurance without limitation, and also because St. Onge testified that he called up Pearl Wait, the sister of the agent, and the person who actually

policy permitted other insurance. The policy here sued on was dated December 23, 1912, and ran from that date to December 23, 1913. At that time a Hartford policy was on the property and in the possession of a pellant's agent at his bank and in his office, and subsequently it was renewed by the policy sued on in the other case, dated and in force February 27, 1913, for one year. The fire was in the night of Sunday, April 13, 1913. St. Onge had no perfectly safe place in which to keep his policies and his Hartford policy then in force was in the vaults of R. P. Watt, the agent of appellant, and this policy was issued by directions by telephone, and was placed in said vault and was never seen by appellees till after the fire. As appellant's agent issued this policy with knowledge that another policy upon the same property was already in force, and did not refuse to issue this policy, or notify assured that the policy we was issuing would immediately be void because the other insurance was outstanding, we think it clear that appellant's agent understood and meant, by delivering this policy with the provisions above quoted, to permit additional concurrent insurance, without placing a limit upon the amount thereof. Any other construction of the policy would make it a fraud upon the insured to have issued it, and the fraud of appellant's agent in issuing it would also be the fraud of a pellant.

Afterwards the policy referred to in our opinion in the Hartford case as the Assured policy was issued by another agent, and appellant are claims that the issuing of that policy invalidated the policy here sued upon. We are of opinion that it did not, both because we interpret the policy here sued on to permit additional concurrent insurance without limitation, and also because St. Onge testified that he called up Pearl Watt, the sister of the agent, and the person who actually

attended to Wait's insurance and wrote his insurance, and asked her how much insurance he had on his property, and told her then that an agent was there representing another insurance company, and that he afterwards told her that he had taken out a policy in the Assured, and would send it up to the bank to have it put in their vault; and that he also afterwards told R. P. Wait over the telephone that he had such a policy, and wished to put it in the bank's vault. It is argued by appellant that Wait and his sister each denied these conversations, and when their evidence, both in the abstract and in the additional abstract, is considered, we conclude that they did not mean to be so understood. Pearl admitted that St. Onge did say something to her about the agent of another insurance company at the time he asked how much insurance he had on his stock of goods; and the most that she and her brother stated positively was that they did not remember being told that he had a policy in the Assured. Inasmuch as St. Onge's testimony was positive and Pearl's was a partial admission, and R. P. Wait and Pearl did not positively deny such statement, but only denied recollecting having received such information, the jury might reasonably believe the positive testimony of St. Onge. We cannot see the witnesses, and we cannot know their manner on the witness stand in testifying on that subject, and it is obvious the jury did believe St. Onge and we are unable to say, in view of the qualified character of the denial of R. P. Wait and Pearl that the jury should have found the other way on this subject.

Certain things occurred at the trial concerning policies on this property once held by St. Onge, issued by the Continental Insurance Company and the Hanover Insurance Company, and it is argued that there was reversible error in the rulings of the court on this subject. Appellees in their brief say that appel-

attended to Watt's insurance and wrote his insurance, and asked her how much insurance he had on his property, and told her then that an agent was there representing another insurance company, and that he afterwards told her that he had taken out a policy in the Assured, and would send it up to the bank to have it put in their vault; and that he also afterwards told P. P. Watt over the telephone that he had such a policy, and wished to put it in the bank's vault. It is argued by appellant that Watt and his sister each denied these conversations, and when their evidence, both in the abstract and in the additional abstract, is considered, we conclude that they did not mean to be so understood. Pearl admitted that St. Onge did say something to her about the agent of another insurance company at the time he asked how much insurance he had on his stock of goods; and the most that she and her brother stated positively was that they did not remember being told that he had a policy in the Assured. Inasmuch as St. Onge's testimony was positive and Pearl's was a partial admission, and P. P. Watt and Pearl did not positively deny such statement, but only denied recollecting having received such information, the jury might reasonably believe the positive testimony of St. Onge. We cannot see the witnesses, and we cannot know their manner on the witness stand in testifying on that subject, and it is obvious the jury did believe St. Onge and we are unable to say, in view of the qualified character of the denial of P. P. Watt and Pearl that the jury should have found the other way on this subject.

Certain things occurred at the trial concerning policies on this property once held by St. Onge, issued by the Continental Insurance Company and the Hanover Insurance Company, and it is argued that there was reversible error in the rulings of the court on this subject. Appellees in their brief say that [illegible]-

lant offered an amendment to its pleadings to raise these questions near the close of the trial, and that the court refused and properly so, to permit said amendment to be made. This appears to be a misapprehension of the state of the record. Appellant originally filed a plea of non-assumpsit, accompanied by a notice of special matter relied upon in defense, in four paragraphs. The record shows that the trial began on April 4, 1916, and that on that day and before the trial began appellant was granted leave of court to amend its notice filed under the plea of the general issue, and thereupon appellant filed another plea of non-assumpsit, and attached thereto a notice of special matter relied upon in defense, in two paragraphs. Whether appellant thereby abandoned such matters of special defense stated under the first plea as were not included in the second plea we do not decide. But this notice set up that when this policy was executed the insured had another policy on the same property in the Continental Insurance Company of New York, and after this policy was executed insured obtained a policy in the Hanover Fore Insurance Company. On the cross examination of St. Onge, and after he had stated that the Hartford policy was in force when the Springfield policy was issued he was asked if that was all the insurance he then had on his stock of goods, and he answered that it was. He was then asked if when the Springfield policy was issued he did not have a policy in the Continental Insurance Company of New York, dated January 1, 1912, expiring January 1, 1913, and if on January 1, 1913, the Continental policy was not renewed, and if thereafter it was not cancelled and a policy issued to him in the Hanover Insurance Company on January 7, 1913, and whether he ever ordered any insurance from Shoenmacher, a fire insurance agent, and whether Shoenmaker ever issued any policies to him

lant offered an amendment to its pleadings to raise these questions near the close of the trial, and that the court refused and properly so, to permit such amendment to be made. This appears to be a misapprehension of the state of the record. Appellant originally filed a plea of non-assumpsit, accompanied by a notice of special matter relied upon in defense, in four paragraphs. The record shows that the trial began on April 4, 1916, and that on that day and before the trial began appellant was granted leave of court to amend its notice filed under the plea of the general issue, and thereupon appellant filed another plea of non-assumpsit, and attached thereto a notice of special matter relied upon in defense, in two paragraphs. Whether appellant thereby abandoned such matters of special defense stated under the first plea as were not included in the second plea we do not decide. But this notice set up that when this policy was executed the insured had another policy on the same property in the Continental Insurance Company of New York, and after this policy was executed insured obtained a policy in the Hanover Fire Insurance Company. On the cross examination of St. Onge, and after he had stated that the Hartford policy was in force when the Springfield policy was issued he was asked if that was all the insurance he then had on his stock of goods, and he answered that it was. He was then asked if when the Springfield policy was issued he did not have a policy in the Continental Insurance Company of New York, dated January 1, 1913, expiring January 1, 1915, and if on January 1, 1915, the Continental policy was not renewed, and if thereafter it was not cancelled and a policy issued to him in the Hanover Insurance Company on January 7, 1915, and whether he ever ordered any insurance from Shoemaker or Fire Insurance agent, and whether Shoemaker ever issued any policies to his

on this stock of goods during 1912 or January 1913, and objections were sustained to these questions. While appellant was putting in its proofs, it made an offer to prove that Shoenmacher, an insurance agent at Reynolds who represented the Continental and Hanover Insurance Companies and others, on January 6, 1912, issued a policy of insurance on this property which policy did not permit other insurance, and that it remained in force until it expired on January 6, 1913, and that another policy was then issued of like character, which was cancelled by the company on January 12, 1913, and that on January 25, 1913, Shoenmakher issued a policy on this property in the Hanover company which permitted certain concurrent insurance, and that said policy was cancelled on February 3, 1913. Appellees objected, and this objection was sustained. Thereafter the court ruled that this might be competent as impeaching the testimony of St. Onge, if appellant would show that either of these policies was in force when St. Onge had his conversation either with Pearl or with R. P. Wait concerning the renewal of the Hartford policy, and appellant's counsel then stated that they did not think they could establish that fact, and the objection was then sustained. It is argued that this was error. It will be perceived that it is not claimed that any of this insurance was in force when this fire occurred. We are of opinion that under the terms of the policy sued upon as above set out, and in view of the facts concerning the issue by appellant's agent of the present policy, when he knew of and had in his possession another policy on the property, and of the other facts above stated, the appellant is to be considered as having permitted additonal concurrent insurance without any limit. Therefore it is immaterial what other insurance was in force when this policy was issued, and what other

on this stock of goods during 1913 or January 1913, and objections were sustained to these questions. While appellant was putting in its proofs, it made an offer to prove that Shoemaker, an insurance agent at Reynolds who represents the Continental and Hanover Insurance Companies and others, on January 8, 1913, issued a policy of insurance on this property which policy did not permit other insurance, and that it remained in force until it expired on January 8, 1913, and that another policy was then issued of like character, which was cancelled by the company on January 15, 1913, and that on January 22, 1913, Shoemaker issued a policy on this property in the Hanover company which permitted certain concurrent insurance, and that said policy was cancelled on February 3, 1913. Appellee objected, and this objection was sustained. Thereafter the court ruled that this might be competent as impeaching the testimony of St. Onge, if a witness would show that either of these policies was in force when St. Onge had his conversation either with Pearl or with R. P. Watt concerning the renewal of the Hartford policy, and appellant's counsel then stated that they did not think they could establish that fact, and the objection was then sustained. It is argued that this was error. It will be p roved that it is not claimed that any of this insurance was in force when this fire occurred. We are of opinion that under the terms of the policy sued on as above set out, and in view of the facts concerning [illegible] by appellant's agent of the insurance policy, [illegible] and had in his possession and [illegible] policy on the [illegible], and of the other facts above stated, [illegible] to be sufficient to consider as having permitted additional [illegible] insurance without any limit. Therefore it is immaterial what other insurance was in force when this policy was issued, and [illegible]

insurance was thereafter issued which was cancelled before the fire.It is material what insurance was in force on this property when this loss occurred, because the more insurance there was in force the less is the proportionate liability of appellant for the amount of the loss. Inasmuch as the supposed facts concerning the issue of the Continental and the Hanover policies and their subsequent cancellation are not material, it was not error to refuse to admit that evidence, and it was not error to refuse to permit a cross examination of St. Onge on that subject, for a witness cannot be impeached upon immaterial matters.

The other contentions of appellant are disposed of in the opinion in the Hartford case. We find no reversible error in the record. The judgment is therefore affirmed.

insurance was thereafter issued which was cancelled before the fire. It is material what insurance was in force on this property when this loss occurred, because the more insurance there was in force the less is the proportionate liability of appellant for the amount of the loss. Inasmuch as the supposed facts concerning the issue of the Continental and the Hanover policies and their subsequent cancellation are not material, it was not error to refuse to admit that evidence, and it was not error to refuse to permit a cross examination of St. Onge on that subject, for a witness cannot be impeached upon immaterial matters.

The other contentions of appellant are disposed of in the opinion in the Hartford case. We find no reversible error in the record. The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6350.

Daniel L. Dougherty, appellee.

vs Appeal from City Court Spring Valley

Spring Valley Coal Company, appellant.

Dibell, J.

On February 16, 1916, while Daniel L. Dougherty was in the employ of the Spring Valley Coal Company as a coal miner, he was injured by a fall of rock from the roof of an entry way. He brought this suit to recover damages for said injuries and had a verdict and a judgment for $950. from which the company appeals.

The original declaration described the roof of the entry as in a dangerous condition and alleged that appellant did not use reasonable care to provide for appellee a reasonably safe place in which to work and reasonably safe condition in which to work, but negligently failed to perform that duty and thereby plaintiff was hurt. The first and second additional counts charged a wilful violation by appellant of provisions of the Mining Act, which required periodical examinations of the mine and that dangerous places be marked and recorded in a book, and to prevent men from going into the mine till the dangerous conditions were removed. The plea was not guilty. It was averred and proved that appellant had never been under the Workmen's Compensation Act, but had rejected the same.

Under the duty set out in the first count, an employer does not become an insurer that the places where he sets his men at work shall be absolutely safe. From Hess v Rosenthal, 160 Ill. 621, to Donk Brothers Coal Co. v Thil, 228 Ill. 233, there are many cases where our Supreme Court following the rule laid down in Cooley on Torts and Wharton on Negligence has held that the duty which the employer owes to the employee

Gen. No. 8350.

Daniel L. Dougherty, appellee.

vs Appeal from City Court Spring Valley

Spring Valley Coal Company, appellant.

Dibell, J.

On February 18, 1916, while Daniel L. Dougherty was in the employ of the Spring Valley Coal Company as a coal miner, he was injured by a fall of rock from the roof of an entry way. He brought this suit to recover damages for said injuries and had a verdict and a judgment for $850. from which the company appeals.

The original declaration described the roof of the entry as in a dangerous condition and alleged that appellant did not use reasonable care to provide for appellee - reasonably safe place in which to work and reasonably safe condition in which to work, but negligently failed to perform that duty and thereby plaintiff was hurt. The first and second additional counts charged a wilful violation by appellant of provisions of the Mining Act, which required periodical examinations of the mine and that dangerous places be marked and recorded in a book, and to prevent men from going into the mine till the dangerous conditions were removed. The plea was not guilty. It was averred and proved that appellant had never been under the Workmen's Compensation Act, but had rejected the same.

Under the duty set out in the first count, an employer does not become an insurer that the places where he sets his men at work shall be absolutely safe. From Hess v Rosenthal, 180 Ill. 681, to Donk Brothers Coal Co. v Thill, 225 Ill. 633, there are many cases where our Supreme Court following the rule laid down in Cooley on Torts and Thurston on Negligence has held that the duty which the employer owes to the employee

in that respect is to exercise reasonable care tosee that the place furnished for the servant to work in is reasonably safe. The evidence here presents two theories as to the facts which resulted in this injury to appellee. The mine was operated on the long wall system. In the mine was an entry known as the nineteenth west entry off the straight north. Off this entry three rooms had been turned, and in one of which appellee mined coal. The coal was about three and one half feet thick and a few inches of material were taken out underneath the coal and then the roof had to be taken down for such a distance above the coal that work could be done. In all roofs of entries of coal mines there is more or less settling of the overhead material that is often composed of rock, and at frequent intervals some of this roof has to be removed, either to make it high enough for men and cars to pass underneath, or to take down rock which is in danger of falling, and this is called "brushing" . The main entries are brushed by "company men" who do this work when the miners are out of the mine. At the edge of the roof as one turned into appellee's room was what was called the "lip" and from the lip to the face of the coal each miner was required to brush his own room. Appellee's proof tended toshow that after reaching his room on the morning of February 16, he went into the main entry and passed some little distance therein to where he kept his box and that he went there for either oil or a drink of water, and while on his way back to his room, and still in the main entry, rock from the roof fell upon him and inflicted the injury complained of. Appellant introduced evidence tending to prove that appellee was injured between the lip and the face of the coal in his room, and that he was engaged in brushing the roof, and pulled this rock down upon himself. There is an apparent preponderance of evidence

in that respect is to exercise reasonable care to see that the place furnished for the servant to work in is reasonably safe. The evidence here presents two theories as to the facts which resulted in this injury to appellee. The mine was operated on the long wall system. In the mine was an entry known as the nineteenth west entry off the straight north. Off this entry three rooms had been turned, and in one of which appellee mined coal. The coal was about three and one half feet thick and a few inches of material were taken out underneath the coal and then the roof had to be taken down or such a distance above the coal that work could be done. In all roofs of entries of coal mines there is more or less settling of the overhead material that is often composed of rock, and at frequent intervals some of this roof has to be removed, either to make it high enough for men and cars to pass underneath, or to take down rock which is in danger of falling, and this is called "brushing". The main entries are brushed by "company men" who do this work when the miners are out of the mine. At the edge of the roof as one turned into appellee's room was what was called the "lip" and from the lip to the face of the coal each miner was required to brush his own room. Appellee's proof tended toshow that after reopening his room on the morning of February 15, he went into the main entry and passed some little distance therein to where he kept his box and coat he went there for either oil or a drink of water, and while on his way back to his room, and still in the main entry, rock from the roof fell upon him and inflicted the injury complained of. Appellee introduced evidence tending to prove that appellee was injured between the lip and the face of the coal in his room, and that he was engaged in brushing the roof, and pulled this rock down upon himself. There is an apparent preponderance of evidence

in favor of appellant's claim, and there is a preponderance of the evidence that that is the account of his injury which appellee gave at the time. If appellee was brushing his own roof and pulled this rock down upon himself, he cannot recover, both because at that place his employer did not owe him the duty set out in the declaration and also for the reasons which we stated in Paietta v Illinois Zinc Co. 153 Ill. App. 506. If, however, he was injured in the main entry as claimed by him, we fail to find in the evidence as abstracted any evidence which would justify the jury in finding that there was any appearance in the roof of the main entry of a dangerous condition so that the company was required to place a danger mark thereat and make an entry to that effect upon its record, or that would authorize the jury to find that the company had not used reasonable care to make that place reasonably safe for its employees. There is a substantial absence of any evidence that a dangerous condition existed there, except the fact, if it be a fact, that rock from the roof did fall. The condition of the roof of an entry is liable to constant change, and the condition which resulted in the fall of the main entry, if rock from its roof did fall upon appellee, may have been produced long after the examination made during the preceeding night. We therefore conclude that the evidence does not support the verdict and that the case must be tried again.

Counsel for appellee put sneering questions to appellant's witnesses on cross examination. They made sneering remarks concerning one of counsel for appellant. One of them told the jury that plaintiff was poor, and invited a comparison by the jury between the financial condition of plaintiff and that of John D. Rockefeller. If the verdict had been excessive for the injuries sustained, we should have seriously considered reversing

in favor of appellant's claim, and there is a reponderance of the evidence that that is the exact account of his injury which appellee gave at the time. If appellee was breaking his own roof and pulled this rock down upon himself, he cannot recover, both because at that place his employer did not owe him the duty set out in the isolation and also for the reasons which we stated in Pulette v Illinois Zinc Co. 152 Ill. App. 508. If, however, he was injured in the main entry as claimed by him, we fail to find in the evidence as abstracted any evidence which would justify the jury in finding that there was any defence in the roof of the main entry of a dangerous condition so that the company was required to place a larger mark thereat and make an entry to that effect upon its record, or that would authorize the jury to find that the company had not used reasonable care to make that place reasonably safe for its employees. There is a substantial absence of any evidence that a dangerous condition existed there, except the fact, if it be a fact, that rock from the roof did fall. The condition of the roof of an entry is liable to constant change, and the condition which resulted in the fall of the main entry, if rock from its roof did fall upon appellee, may have been produced long after the examination made during the preceding night. We therefore conclude that the evidence does not support the verdict in that the case must be tried again.

Counsel for appellee put searching questions to appellant's witnesses on cross examination. They made searching examination during one of counsel for appellant. One of the jurymen that plaintiff was poor, and invited a comparison by the jury between the financial condition of plaintiff and that of John D. Rockefeller. If the verdict had been in favor of the injuries sustained, we should have sent a second reversing

the judgment for this misconduct of counsel. This conduct may have pleased appellee's friends in the trial court in his home town, but its tendency here is to lead the court to feel that counsel doubted their ability to procure a verdict for appellee under the evidence and the law without these improper influences.

The judgment is reversed and the cause remanded.

the judgment for this misconduct of counsel. This conduct may have pleased appellee's friends in the trial court in his home town, but its tendency here is to lead the court to feel that counsel doubted their ability to procure a verdict for appellee under the evidence and the law without these improper influences.

The judgment is reversed and the cause remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on [illegible] 1917 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

John Seymour,
Appellant,
-vs-
Woodstock and Sycamore
Traction Company, et al,
Appellees.

Appeal from DeKalb.

DIBELL, J.

On October 16, 1913, John Seymour filed a bill in equity against the Woodstock and Sycamore Traction Company (hereinafte called the Woodstock company) the Chicago, Waukegan and Fox Lake Traction Company (hereinafter called the Waukegan company) the Interurban Construction Co pany of Chicago (hereinafter called the Interurban company) the Northeastern Electric Railway Company, (hereinafter called the Northeastern company) and the Central Trust Company of Illinois, to obtain a lien upon the property of the Woodstock company and the Waukegan company for certain labor and material furnished for the building of a line of interurban railway for the Woodstock company. There was service upon each defendant. The Central Trust Company answered, denying all knowledge of the allegations of the bill except as informed thereby, and calling for strict proof, and asserting that it had a prior lien upon the property as trustee under a certain deed of trust securing certain outstanding bonds of the Woodstock company. The Waukegan and the Woodstock companies filed a joint answer, in which they denied knowledge except by the bill of complaint as to the allegations of the bill, except as to its allegations concerning the Waukegan company, and denied that Seymour was entitled to a lien, or to any relief against the said two defendants. The record before us is

John Seymour,
Appellant,

-vs-

Appeal from Kane C.

Woodstock and Sycamore
Traction Company, et al,
Appellees.

DIRECT, J.

On October 16, 1913, John Seymour filed a bill in equity against the Woodstock and Sycamore Traction Company (hereinafter called the Woodstock company) the Chicago, Waukegan and Fox Lake Traction Company (hereinafter called the Waukegan company) the Interurban Construction Company of Chicago (hereinafter called the Interurban company) the Northwestern Electric Railway Company, (hereinafter called the Northwestern company) and the Central Trust Company of Illinois, to obtain a lien upon the property of the Woodstock company in the Waukegan company for certain labor and material furnished for the building of a line of interurban railway for the Woodstock company. There was a service upon each defendant. The Central Trust Company answered, praying the knowledge of the allegations of the bill except as informed thereby, and asking for strict proof, and asserting that it had no notice upon the corporate as trustee under a certain deed of trust securing certain outstanding bonds of the Woodstock company. The Waukegan and the Woodstock companies filed a joint answer, in which they admitted knowledge except by the bill of complaint to the allegations of the bill, except as to its alleged connection with the Waukegan company, and denied that Seymour was entitled to a lien, or to any relief against the said two defendants. The record before us is

certified to be a complete record of the answers and of the orders of court, and it contains no answer by the other defendants, not any default against them. It contains a reference to the master to state an account, with his conclusions of law and fact, but nothing to show that anything was ever done under that reference, the statement in appellant's brief on that subject being entirely outside of the record. On March 28, 1916, complainant filed an amendment to his bill of complaint, to which a demurrer was sustained. Thereafter he filed an amendment to said amendment by which he struck out certain language of the amendment and added certain language thereto. A demurrer was sustained to the bill as then amended. Complainant elected to stand by the bill of complaint as amended, and the bill was dismissed as to all of the defendants for want of equity, but without prejudice to the right of the complainant to proceed either at law or in equity otherwise than by a suit to enforce a lien, the final decree stating that the demurrer to the bill as amended was sustained for the reason that said bill did not state facts sufficient to entitle complainant to a mechanic's or materialman's lien. This is an appeal by Seymour therefrom.

The suit is under the act concerning liens upon railroads, Hurd's R.S. of 1916, 1654, 1655. That act requires suit to be commenced within six months after the contract is completed and requires subcontractors to serve a certain notice in writing within a certain time. The bill alleged that the work was completed June 1, 1913, so that the suit was begun in time if complainant was an original contractor. There was no allegation of any notice served, so that the bill did not state a case entitling complainant to a lien if he was a subcontractor. If the amendment filed in

certified to be a complete record of [illegible] and of the orders of court, and it contains no answer by the other defendants, not any default against them. It contains a reference to a master to state an account, with his conclusions of law and fact, but nothing to show that anything was ever done under the reference. The statement in appellant's brief on that subject being a literary outside of the record. [illegible] March 22, 1912, complainant filed an amendment to his bill of complaint, to which a demurrer was sustained. Thereafter he filed an amended bill to cold [illegible] out by which he struck out certain language of the [illegible] and added certain language thereto. A demurrer was sustained to [illegible] bill as amended. Complainant elected to stand by [illegible] complaint as amended, and the bill was dismissed [illegible] defendants for want of equity, but without [illegible] complainant to proceed either at law or in equity [illegible] by a suit to enforce a lien, [illegible] demurrer to the bill as amended was [illegible] of [illegible] did not state facts sufficient [illegible] or materialmen's lien. [illegible]

The suit is under [illegible] Hurd's R.S. of 1912, [illegible] commenced within six months after [illegible] requires subcontractors [illegible] a certain time. The bill [illegible] June 1, 1912, so that [illegible] an original contractor. [illegible] served, so that the [illegible] to a lien if he was a subcontractor. In the [illegible] filed in

1916 stated a new cause of action it was barred, because the suit as to it was not begun within six months, and because no notice was given of a subcontractor's lien. It is therefore necessary to inquire into the allegations of the original bill, and to compare them with the allegations of the amendment.

The bill alleged that Seymour was in the business of a railroad contractor, and that on August 18, 1908, as such contractor, he entered into a written contract with the Northeastern company which he alleged was a corporation duly organized under the laws of the state of Illinois, by which he agreed to furnish certain material and to certain work, and clear the right of way of a certain railroad crom Sycamore to connect with the Elgin and Belvidere Railroad; that said Northeastern company was a construction company organized for the purpose of constructing a railroad, to be called the Woodstock and Sycamore Traction Company, to extent from Sycamore to Woodstock. A copy of the contract was attached to and made a part of the bill as exhibit A. That contract described what was to be done and the prices to be paid, and contained no allusion to the Woodstock company but said exhibit A purported to be executed by said Northeastern company by C. G. Lumley, president, and the bill elsewhere averred that C.G.Lumley was also president of the Woodstock company. The bill also alleged that on February 9, 1909, Seymour entered into another contract in writing with said Northeastern company to furnish certain other material to said Northeastern company under a contract made exhibit B. Said contract contained no reference to the Woodstock company

1910 stated [illegible]
as to it was not known [illegible]
was given [illegible]
to inquire into the [illegible]
pare them with the [illegible]

The bill [illegible]
road contractor, [illegible]
be entered into [illegible]
which he alleged [illegible]
of the state [illegible]
material and [illegible]
certain railroad [illegible]
Belvidere [illegible]
attention [illegible]
railroad, to be [illegible]
to extent [illegible]
attached [illegible]
treat [illegible]
contract [illegible]
A purported [illegible]
Lum ey, [illegible]
was also [illegible]
that on [illegible]
in writing [illegible]
material to [illegible]
B. [illegible]

except that it provided that payment for the material therein specified was to be partly in bonds of the Woodstock company at par, and partly in stock of the Woodstock company, and partly in cash; but it purported to be executed by said Northeastern company by Charles N. Spenny, secretary, and the bill elsewhere averred that he was also secretary of the Woodstock company. The bill also averred that on March 17, 1910, Seymour entered into a contract with the Interurban company, which the bill alleged was a corporation duly organized under the laws of the state of Illinois, by which Seymour agreed to do certain work for the construction of a railroad from the Chicago Great Western Railroad tracks in Sycamore north to the south side of the tracks of the C.M.& St.P.R.R. in in Genoa, according to a survey made by the engineer of the Woodstock company, and it was alleged that said contract was entered into by the Interurban company by Lumley, its president, and Spenny, its secretary, and that the Interurban company was organized for the purpose of constructin the Woodstock and Sycamore Traction Railroad which was then in process of construction between the two railroads above named in Sycamore and Genoa, and it averred that Lumley was president of the Woodstock company and also of the Interurban company, and that Spenny was secretary of the Woodstock company and also of the Interurban company, and a copy of said contract was made exhibit C, and said exhibit contains the prices to be paid. The bill also alleged that on March 17,1910, Seymour entered into another contract with said Interurban company to do certain work for the construction of said Woodstock company's railroad, covering the distance from the south side of the C.M.& St. P.R.R. tracks at Genoa north to the south side of the tracks of the C.& N.W. R.R. at Marengo, and the bill made the same allegations as to Lumley and Spenny being officers of both companies. Exhibit

except that it provided that payment for the [illegible] the rein specified was to be partly in bonds of the Woodstock [illegible] company, t par, and partly in stock of the [illegible] company, [illegible] partly in cash; but it purported to be executed by said [illegible] company by Charles H. Spenny, secretary, and the bill also [illegible] averred that he was also secretary of the Woodstock company. The bill also averred that [illegible] March 27, 1910, Seymour entered into a contract with the Interurban company, which the bill alleged [illegible] corporation duly organized under the laws of the state of [illegible], by which Seymour agreed to do certain work [illegible] the construction of [illegible] road from the Chicago [illegible] to the [illegible] in Ypsilanti north to the south side of the village of the C.L.S. & S.I.R.R. in Geneva, according to survey made by the engineer of the Woodstock company, [illegible] entered into by the Interurban company by [illegible], its president, and Spenny, its secretary, [illegible] Interurban company [illegible] used for the [illegible] Traction Railroad which [illegible] between the two railroads [illegible] averred that in [illegible] of the Interurban company, [illegible] Woodstock company [illegible] said contract [illegible] copy of the prices to be [illegible] 7, 1910, Seymour entered into [illegible] to do certain [illegible] company's railroad, covering [illegible] the C.L.S. & S. B.R.R. tracks at [illegible] the tracks of the C.& N.W. R.R. at [illegible] bill [illegible] to Lumley and Storey both [illegible] in [illegible]

D shows the prices to be paid. The bill also alleged that on October 21, 1912, Seymour entered into another contract with the Waukegan company to construct and finish in every respect to the satisfaction of the general manager of the Waukegan company or his engineer all work necessary to be done to complete the railroad of the Woodstock company from the north side of their track on East Main street in Genoa to a connection with the Woodstock company's car barn north of Genoa. This contract was made Exhibit F. and the bill averred and the exhibit showed that it was executed by said Waukegan company by Spenny as secretary, and the bill averred that Spenny was then secretary of the Woodstock company and that the Waukegan company was then the owner of a majority of the stock of the Woodstock company, and that said contract was for the construction and completion of the railroad of the Woodstock company between said two points last named.

The bill alleged that Seymour furnished the material and did the work required by said respective contracts, and that on an account being taken between Seymour and the Woodstock company and the Waukegan company for said work and material, there is due to Seymour from the Woodstock company and the Waukegan company $20,000, for which Seymour is entitled to a lien upon the property of the Woodstock company and the Waukegan company, and as against all mortgages or other liens which accrued after the commencement and delivery of the material and work, and that this work was completed on June 1, 1913, and that Seymour has frequently asked the officers of the Waukegan company and the Woodstock company to pay him, and they have refused to do so, and have refused and neglected to complete the terms of said contracts, and have stated that they

D shows the prices to be paid. The bill also [illegible] that on October 21, 1912, Seymour entered into another contract with the Wankegan company to construct and finish in every respect to the satisfaction of the general manager of the Wankegan company or his engineer all work necessary to be done to connect the railroad of the Woodstock company from the north side of their track on East Main street in Genoa to a connection with the Woodstock company's car barn north of Genoa. This contract was marked Exhibit F. and the bill averred and the exhibit showed that it was executed by said Wankegan company by Spenny as its agent, and the bill averred that Spenny was then president of the Woodstock company and that the Wankegan company was then the owner of a majority of the stock of the Woodstock company, [illegible] construction and completion [illegible] between said two points [illegible].

The bill alleged [illegible] the work required by [illegible] account being taken between [illegible] and the Wankegan company [illegible] to Seymour from the [illegible] $20,000, for which Seymour [illegible] of the Woodstock company [illegible] all mortgages or other liens [illegible] and delivery of the [illegible] completed on June 1, 1913, [illegible] officers of the Wankegan [illegible] him, and they have refused [illegible] to complete the [illegible]

have not sufficient funds to pay complainant.

The bill does not allege that Seymour made any contract with the Woodstock company. It does not alleged what relation the Northeastern company and the Interurban company bore to the Woodstock company, or that they bore any relation to it except as above stated. The same is true as to the Waukegan company. There is at least an implication that the Northeastern company and the Interurban company had contracts for the construction of portions of the road of the Woodstock company. If so, this would make Seymour a subcontractor No relation is shown between the Waukegan company and the Woodstock company except it is averred that at the time the last contract, Exhibit F, was made, the Waukegan company owned a majority of the stock of the Woodstock company. It is at least implied by the nature of the contract, Exhibit F, that the Waukegan company was an original contractor as to that part of the line specified in Exhibit F, and that Seymour was a subcontractor. If Seymour was a subcontractor, then the bill did not state facts alleging a lien, because it did not show that he had done those things required by the statute of a subcontractor. It appears to be now claimed, in support of appellant's contention that the original bill stated a case entitling him to a lien upon the property of the Woodstock company, that the allegations that theofficers who signed these respective contracts for the Northeastern company, the Interurban company and the Waukegan company were at the same time officers of the Woodstock company, and that under one contract payment was to be made partly in bonds and partly in stock of the Woodstock company, and that as to the last contract by the Waukegan company the latter owned a majority of the stock of the Woodstock

have not sufficient funds to pay complainant.

The bill does not allege that Seymour made any contract with the Woodstock company. It does not allege what relation the Northeastern company and the Interurban company bore to the Woodstock company, or that they bore any relation to it except as above stated. The same is true as to the Muskegon company. There is at least an implication that the Northeastern company and the Interurban company had contracts for the construction of portions of the road of the Woodstock company. If so, this would make Seymour a subcontractor. No relation is shown between the Muskegon company and the Woodstock company except it is worked that at the time the last contract, Exhibit E, was made, the Muskegon company owned a majority of the stock of the Woodstock company. It is at least implied by the nature of the contract, Exhibit E, that the Muskegon company was an original contractor [illegible] at the time specified in Exhibit E, and that Seymour was a subcontractor. If Seymour was a subcontractor, then the bill [illegible] to state a cause alleging a lien, because it did not show [illegible] those required by the statute of [illegible] contractor [illegible] to be shown claimed, in support of his [illegible] contention that the original bill stated a case entitling him [illegible] of the Woodstock company, that the Ridgetown [illegible] these respective contracts [illegible] Interurban company and the Muskegon [illegible] officers of the Woodstock company, [illegible] ment was to be made partly in bonds [illegible] Woodstock company, and that [illegible] company the latter owned a majority of the stock of the contractor [illegible]

company, are sufficient to show and are equivalent to a
these three companies were dummy companies and were reall
of them parts of the Woodstock company, and that those cont
were really made with Seymour by the Woodstock company. We
cannot assent to this conclusion. We are of opinion that it is
not the law that the fact that two corporations have the same pre-
sident is proof that they are one and the same company; nor that
that result follows if two corporations have the same president and
the same secretary; nor because one contractor agrees to pay in
part for work done by delivering bonds or stock of another corpora-
tion does that prove that the two corporations are the same; nor
does the fact that one corporation owns the majority of the stock
in another, if it can lawfully hold such stock, prove that both
corporations are the same. It is undoubtedly true that such facts
might have some tendency to show that there was some relation
between the two corporations in their business dealings or other-
wise. But such allegations alone do not amount to allegations
that the one corporation is a dummy for the other, and that what
the one corporation does the other really does. There is no
allegation in this bill that any fraud was committed upon Seymour,
or that he was in any respect deceived. For all that here appears,
he may have been fully cognizant of every relation that existed
between these several companies. The bill alleges that the North-
eastern company and the Interurban company were organized for the
purpose of constructing parts of this line of road, which means
that they were organized for the purpose of taking contracts for
the building of certain portions of this line of road. Under the
allegations of the bill either Seymour has no case whatever against
the Woodstock company, or it is only as subcontractor, and
for failure to show that he took the steps required by the statute

company, are sufficient to show that [illegible] equivalent to [illegible] these three companies were dummy corporations [illegible] of them parts of the Woodstock company, and that [illegible] were really made with Seymour by the Woodstock company. [illegible] cannot assent to this conclusion. We are [illegible] opinion that [illegible] not the law that the fact that two corporations have the same president [illegible] sident is proof that they are one and the same company; nor that that result follows if two corporations have the same president and the same secretary; nor because one contractor [illegible] to pay in part for work done by delivering bonds or stock of another corporation does that prove that the two corporations are the same; nor does the fact that one corporation owns the majority of the stock in another, if it can lawfully hold such stock, prove that both corporations are the same. It is undoubtedly true that such facts might have some tendency to show that [illegible] relation between the two corporations in their dealings or otherwise. But such allegation [illegible] to allege that the one corporation is dummy or [illegible], and that what the one corporation does the other really does. [illegible] no allegation in this bill that any [illegible] Seymour, or that he was in any [illegible] contract. [illegible] he may have been their agent [illegible] between these several companies. The bill alleges that the Northeastern company and [illegible] were organized for the purpose of constructing [illegible] line of road, [illegible] that they were [illegible] the building of certain [illegible] line road. Unless the allegations of the bill either [illegible] no cause of [illegible] against the Woodstock company, [illegible] for failure to show that [illegible] state [illegible]

to establish a subcontractor's lien, the bill states no case.

The first amendment changed the alleged liability of $20,000 to $40,000, and that need not further be referred to. It then make certain allegations in regard to the contracts. The second amendment struck out certain language contained in the first amendment in regard to contracts, and added certain language, and therefore the first amendment on that subject will be stated so as to include the changes made by the second amendment. The amendments alleged that this improvement consisted of one entire railroad, extending from Sycamore to Marengo, and was constructed and is operated as one line of railroad; that Seymour was the original contractor for the construction thereof, and said road was constructed by Seymour under the contracts specified in the original bill, and the contract thereinafter mentioned in the amendment, called "the force account", and that there were no subcontractors or subcontracts for the construction of said road; that the Northeastern company and the Interurban company were identical and were owned and controlled by the Woodstock company, and the officers and directors of each were the same as the officers and directors of the Woodstock company; that all payments for work and material in the construction of said road under said contracts were made to Seymour directly by the Woodstock company, and that the bonds and stock of the Interurban company and the Northeastern company were sold and the proceeds turned over to the Woodstock company, and said Woodstock company controlled, fully and entirely, the construction of said railroad, and that the stocks and bonds of the Interurban Company and the Northeastern company and all their real and personal property were owned by the Woodstock company;

to establish a subcontractor's lien, the bill [illegible] .

The first amendment charged the alleged liability of $[illegible],000 to $40,000, and that need not further be referred to. It also made certain allegations in regard to the contracts. The second amendment struck out certain language contained in the first amendment in regard to contracts, [illegible] certain language, and therefore the first amendment on that subject will be [illegible] so as to include the changes made by the second amendment. The second [illegible] alleged that this improvement consisted of one continuous railroad, extending from Dyersburg to Ripley, and was constructed and is operated as one line of railroad; that [illegible] contractor for the construction thereof, and [illegible] constructed by [illegible] under the contracts specified in the original bill, and the street railway was referred in the amendment, called "the [illegible]", [illegible] or subcontracts for the [illegible] Northeastern company and the [illegible] and were owned and [illegible] by the [illegible] officers and directors [illegible] directors of the [illegible] material in the construction [illegible] were made to [illegible] the bonds [illegible] company were [illegible] company, [illegible] the construction [illegible] of the Interurban [illegible] road and [illegible] and all the [illegible]

that while Seymour was engaged in the construction of said work, the Waukegan company, by some arrangement unknown to Seymour, assumed control of the Woodstock company, and that the completion of said line under said contracts was entered into directly with Seymour and the Waukegan company, but the work performed and material furnished by Seymour under said contracts was in the construction of the railroad of the Woodstock company. The amendment further alleged that a part of the construction of said railroad was performed by Seymour under a contract made with the Woodstock company known and denominated as the force account; that said force account related to work and material provided for and covered by said contracts Exhibits A to F inclusive in said original bill, and was a book account or form by which said original contracts were performed by complainant; said force account being kept by the officers of the Woodstock company, and denominated a force account on its books, for the purpose of keeping the account of certain work provided for by said Exhibits A to F inclusive; that under said contract between Seymour and said Woodstock company the Woodstock company advanced money sufficient to pay for the labor and material used in such construction, and that Seymour superintended said construction, and for his services was to receive fifteen per cent of the amount of expenditures shown by said force account; and that under said force account he constructed the line of said road over the streets of Genoa and over the streets of Marengo, and ballasted said track from Sycamore to Genoa and through the city of Genoa and the car barn extension and the line from Sycamore to Genoa and Genoa to Marengo, and that a large part of said $40,000 now due him and for which this lien is to be enforced is due under said contract denominated the force account.

that while Seymour was engaged in the [illegible] work,
the Waukegan company, by some arrangement unknown to Seymour,
assumed control of the Woodstock company, and [illegible] completion
of said line under said contracts was entered into directly with
Seymour and the Waukegan company, but the work performed and material
furnished by Seymour under said contracts was in the construction
of the railroad of the Woodstock company. The [illegible] further
alleged that a part of the consideration [illegible] said [illegible] per-
formed by Seymour under [illegible] contracts made with the Woodstock company
known and denominated as the [illegible] account; that said [illegible] account
related to work and material [illegible] and furnished by said
contracts Exhibits [illegible] to [illegible] inclusive in said [illegible] bill, and
was a book account or [illegible] by which said [illegible] contracts were
performed by complainant; said [illegible] to count [illegible] kept by the
officers of the Woodstock company, [illegible] on its books, for [illegible] work provided for by [illegible] said contract between Seymour [illegible] Woodstock company [illegible] and material used in such [illegible] intended said construction, [illegible] fifteen per cent of the [illegible] account; and that [illegible] of said road [illegible] Marengo, and [illegible] through the city [illegible] from Sycamore to Marengo, [illegible] of said [illegible] enforced in due [illegible] Line is to be

We think it entirely clear that these amendments state an entirely new case. It makes the other companies merely the agents of a part of the Woodstock company, and alleges that there were no subcontractors, and that those were contracts directly between Seymour and the Woodstock company, and alleges that he was to be paid, not the prices entered in these contracts, but that the Woodstock company furnished and paid for the work and material and that his compensation was to be fifteen per cent upon the outlay, as superintendent of construction. Appellees contend that even if these allegations had been embodied inthe original bill they would not make a case for certain reasons stated, but we deem it unnecessary to inquire into that. These amendments were filed in 1916, some three years afyer the original bill was filed, and long after the period fixed by the statute had expired, and the fact that this, as a new bill, was barred by the statute appears on the face of the bill, and therefore can be raised by demurrer. Ilett v Collins, 103 Ill. 74. As the case stated by the bill as amended does not entitle Seymour to a mechanic's or materialman's lien under the statute, because not filed within the time required thereby, the demurrer was properly sustained thereto, and as Seymour elected to stand by his bill as amended, the bill therefore was properly dismissed, and it is unnecessary to inquire into the other questions discussed by appellees.

The decree is affirmed.

We think it entirely clear that these amendments state an entirely new case. It makes the other companies merely the agents of a part of the Woodstock company, and alleges that there were no subcontractors, and that these were contracts directly between Seymour and the Woodstock company, and alleges that he was to be paid, not the prices entered in these contracts, but that the Woodstock company furnished and paid for the work and material and that his compensation was to be fifteen per cent upon the entire as apportionment of construction. Appellees contend that even if these allegations had been embodied in the original bill they would not make a case for certain reasons stated, but we deem it unnecessary to inquire into that. These amendments were filed in 1910, some three years after the original bill was filed, and long after the period fixed by the statute had expired, and the fact that this, as new bill, was barred by the statute appears on the face of the bill, and therefore can be raised by demurrer. Ilett v Collins, 108 Ill. 74. As the case stated by the bill as amended does not entitle Seymour to a mechanic's or material man's lien under the statute, because not filed within the time required thereby, the demurrer was properly sustained thereto, and as Seymour elected to stand by his bill as amended, the bill therefore was properly dismissed. It is unnecessary to inquire into the other questions discussed by appellees.

The order is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 6th day of January, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures fowllowing, to-wit:

AT A TERM OF THE APPELLATE COURT,

[illegible] and held at Ottawa, on Tuesday, the sixth day of October, [illegible] in the year of our Lord one thousand nine hundred and fourteen, [illegible] within and for the Second District of the State of Illinois, [illegible]esent--The Hon. DUANE L. CARNES, Presiding Justice.

Hon. DORRANCE DIETZ, Justice.

Hon. JOHN M. DIBNAR, Justice.

CHRISTOPHER C. DUFFY, Clerk.

L. G. MISCHKE, Sheriff.

[illegible]

BE IT REMEMBERED, [illegible]

January, A. D. 19[illegible]

[illegible] Clerk's office [illegible]

following, to-wit:

Gen. No. 6383.

John Jaegle , appellee

vs Appeal from LaSalle.

The estate of Emil Jaegle,

deceased. appellant.

Dibell, J.

John Jaegle filed a claim in the Probate Court of LaSalle County against the estate of Emil Jaegle, deceased, to recover $3,039. made up of $1,500 for labor and services performed for Emil in his lifetime at his request, and $1,539 for rent of thirty eight acres of land from March 1, 1906, to March 1, 1915, at $4.50 per acre, as per lease. The administratrix filed five written objections to the allowance of the claim. The claim was tried in the probate court and allowed in the sum of $1,432. The administratrix appealed to the circuit court, where the case was tried by a jury and the claim was allowed in the sum of $1,500 and this is an appeal from said judgment.

John, Gust and Emil Jaegle were brothers and owned small farms not far from each other. John was a bachelor. The others were married and had homes. John for certain years lived with Gust and worked for him for wages. John leased his land to Emil from the first day of March 1905 to the first day of March 1911, at $150. per year. $75. payable on September first and $75 on March first, throughout the periodof the lease. Emil died January 19, 1915. Theretofore in 1904, John had ceased to work for Gust and went to live in the home of Emil and lived there the rest of Emil's life and did work on Emil's farm. This claim is for his services while he lived with Emil and for the rent of said farm. Appellee contends that the written objections filed by the administratrix to the claim concede that John rendered the services claimed, and that Emil had the use of the land, and that the only defense set up

Gen. No. 6388.

John Teagle, appellee

vs. Appeal from LaSalle.

The estate of Emil Teagle,

deceased, appellant.

Dibell, J.

John Teagle filed a claim in the Probate Court of LaSalle County against the estate of Emil Teagle, deceased, to recover $3,039, made up of $1,800 for labor and services performed for Emil in his lifetime at his request, and $1,800 for rent of thirty eight acres of land from March 1, 1908, to March 1, 1912, at $4.50 per acre, as per lease. The administratrix filed five written objections to the allowance of the claim. The claim was tried in the probate court and allowed in the sum of $1,439. The administratrix appealed to the circuit court, where the case was tried by a jury and the claim was allowed in the sum of $1,800 and this is an appeal from such judgment.

John, Gust and Emil Teagle were brothers and owned small farms not far from each other. John was a bachelor. The others were married and had homes. John for certain years lived with Gust and worked for him for wages. John leased his land to Emil from the first day of March 1908 to the first day of March 1911, at $150. per year. $75. payable on September first and $75 on March first, throughout the period of the lease. Emil died January 12, 1913. Therefore in 1911, John had ceased to work for Gust and went to live in the home of Emil and lived there the rest of Emil's life [illegible] on Emil's farm. This claim is for his services while he lived with Emil and for the rent of Emil's farm. A [illegible] written objection [illegible] filed by the administratrix [illegible] concede that John rendered the services claimed, [illegible] had the use of the land, and that [illegible]

is that the services were paid for, and that the rent was paid; and that the burden was on the estate to prove such payment, and that payment has not been established, and therefore the judgment should stand. This is a mistake. One of the objections was that neither Emil nor his estate had ever been indebted to claimant for any part of his claim. No denial could be more complete.

Upon a consideration of the evidence concerning the services rendered by John to Emil, we are of opinion that that evidence would not sustain the judgment. There was proof that the going wages for a hired man in that community during those years was from $25 to $35 per month and board and lodging during certain months of the year, and board and lodging only during the winter months. There was also proof that Emil made a remark to a neighbor which might be understood to mean that he was paying John $25 per month. There is no proof that John worked for Emil all that time. There is proof that he did husking for Henry Jaegle a week or so. There is proof that he worked for William Jaeble; that he shocked oats for William Meyers; that he worked for Charles Seip in 1913 and 1914 and earlier years; that he plowed corn, husked corn, shocked oats and put up hay for Seip. There is proof that he worked for Edward Erych once or twice each year. These men didnot obtain his services from Emil, but hired John and paid John. A witness wished to hire men for the town on road and bridge work, and applied to Emil to get John for that work, and Emil said he had nothing to do with John, to go and hire him. This was in the presence of John. John did various kinds of work in 1910, 1911, 1913 and 1914 for the town of Richland, for which he was paid by the town sums aggregating $84.50. The proof shows that Emil and his family paid out much money for John during this period. John

is that the services were paid for, and that the rent was paid; and that the burden was on the estate to prove such payment, and that payment has not been established, and therefore the judgment should stand. This is a mistake. One of the objections was that neither Emil nor his estate had ever been indebted to claimant for any part of his claim. No denial could be more complete.

Upon a consideration of the evidence concerning the services rendered by John to Emil, we are of opinion that that evidence would not sustain the judgment. There was proof that the going wages for a hired man in that community during those years was from $25 to $35 per month and board and lodging during certain months of the year, and board and lodging only during the winter months. There was also proof that Emil made a remark to a neighbor which might be understood to mean that he was paying John $25 per month. There is no proof that John worked for Emil all that time. There is proof that he did husking for Henry Jaegle a week or so. There is proof that he worked for William Jaeble; that he did chore work for William Meyers; that he worked for Charles Selp in 1913 and 1914 and earlier years; that he plowed corn, husked corn, shocked oats and put up hay for Selp. There is or of that he worked for Edward Tryon once or twice each year. There was no direct obtain his services from Emil, but hired John and paid John. A witness testified that men for the town on road and bridge work, and that Emil told John to get John for that work, and Emil [illegible] to go with John, to go and hire him. There was [illegible] of John. John did various kinds of work in 1912, 1913, 1913 and 1914 for the town of Highland, for which he was paid by the town some aggregating $8[illegible].50. The record shows that Emil and his family paid out much money for John during the period. John

contracted bills with a certain saloon keeper for which Emil paid the total amount of $58.90. John contracted bills with another saloon keeper and Emil paid those. Alice Jaegle, a daughter of Emil, living at the home, frequently furnished John with money and saw her father, Emil, pay John money at different times. A store keeper testified that John bought goods in his store and seldom paid for them himself, but would have them charged to Emil and Emil paid for them and that the sums paid by Emil for John would average $25 per year. There is proof that Mrs. Emil Jaegle paid $20 to $25 per year at a store for goods which John bought. There is proof that Emil paid the taxes on John's land and his dues at his church There is also proof that John was much addicted to the use of intoxicating liquors and was often unfit to work on the farm. There is no proof how much work he did on the farm for Emil, and with all this undisputed proof of his working elsewhere at will and collecting his own pay and having many bills paid by Emil and by Emil's wife, and of money supplied to him by Emil and by Alice, there is no basis in the evidence from which the jury could decide what he ought to be allowed, if anything for his services during the last five years of Emil's life, back of which time the Statute of Limitations, set up in one of the objections, was a defense.

There is no evidence which would sustain this judgment as being for rent. The lease expired on March 1, 1911. There is no proof that any rent up to that date remained unpaid. There is positive proof that it was all paid to that time. If the lease was treated as continued in force the rent thereafter to the death of Emil would be much less than the amount of the judgment. There is positive proof that in March 1911, upon the expiration of the lease, it was agreed between John and Emil

contracted bills with a certain saloon keeper for which Emil paid the total amount of $88.80. John contracted bills with another saloon keeper and Emil paid those. Alice Jaegle, a daughter of Emil, living at the home, frequently furnished John with money and saw her father, Emil, pay John money at different times. A store keeper testified that John bought goods in his store and seldom paid for them himself, but would have them charged to Emil and Emil paid for them and the same paid by Emil for John would average $25 per year. There is proof that Mrs. Emil Jaegle paid $30 t. $35 per year at the store for goods which John bought. There is proof that Emil paid the taxes on John's land and his dues at his church. There is also proof that John was much addicted to the use of intoxicating liquors and was often unfit to work on the farm. There is no proof how much work he did on the farm for Emil, and with all this unlisputed proof of his working elsewhere at will and collecting his own pay and having many bills paid by Emil and by Emil's wife, and of money supplied to him by Emil and by Alice, there is no basis in the evidence from which the jury could decide what he ought to be allowed, if anything for his services during the last five years of Emil's life, back of which time the Statute of Limitations, set up in one of the objections, was a bar.

There is no evidence which would sustain this judgment as being for rent. The lease expired on Nov. 1, 1911. There is no proof that any rent up to that date remained unpaid. There is positive proof that it was all paid to that date. If the lease was treated as continued in force [illegible] thereafter to the death of Emil would be much less than the amount of his judgment. There is positive proof that in March [illegible], upon the expiration of the lease, it was agreed between John and Emil

that John should have his home there and have his board and clothing and spending money and that Emil should have the use of the land. There is proof of statements by John to others indicating that such an arrangement was made, and much proof tending to show that thereafter the parties lived in the family relation referred to in Heffron v Brown, 155 Ill. 323, and many other cases.

In the view we take of the case the proof on neither branch of the claim will support an allowance to appellee. At the trial appellant waived all objection to the competency of appellee as a witness in his own behalf and that made him a competent witness for that trial, and if he had any contract with Emil to pay him wages or rent after the expiration of the lease, March 1, 1911, he could have proved what that contract was, andhow much work he did for Emil. He did not avail himself of the evidence thus placed within his control, and therefore cannot rely upon the difficulty of establishing his case because of his being an incompetent witness.

The judgment is therefore reversed and the cause remanded.

that John should have his home there and have his board and clothing and spending money and that Emil should have the use of the land. There is proof of statements by John to others indicating that such an arrangement was made, and much proof tending to show that thereafter the parties lived in the family relation referred to in Heffron v Brown, 155 Ill. 338, and many other cases.

In the view we take of the case the proof on neither branch of the claim will support an allowance to appellee. At the trial appellant waived all objection to the competency of appellee as a witness in his own behalf and that made him a competent witness for that trial, and if he had any contract with Emil to pay him wages or rent after the expiration of the lease, March 1, 1911, he could have proved what that contract was, anhow much work he did for Emil. He did not avail himself of the evidence thus placed within his control, and therefore cannot rely upon the difficulty of establishing his case because of his being an incompetent witness.

The judgment is therefore reversed and the cause remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opiuion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

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204 I.A. 155

BE IT REMEMBERED, that afterwards, to-wit: on the 6th day of January, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures fowllowing, to-wit:

AT A TERM OF THE APPELLATE COURT,

[illegible]ron and held at Ottawa, on Tuesday, the sixth day of October,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois.

[illegible]resent--The Hon. DUANE L. CARNES, [illegible]

Hon. DORRANCE DIGGLE, [illegible]

Hon. JOHN M. [illegible]

CHRISTOPHER C. [illegible]

J. G. MISCHKE, [illegible]

BE IT REMEMBERED [illegible]

January, A. D. [illegible]

e Clerk's off[illegible]

wlowing, to-wit:

Gen. No. 8383.

W. A. Kelly, appellee.

vs Appeal from LaSalle.

Charles Sanderson, appellant.

Dibell, J.

Kelly sued Sanderson in the Circuit Court of LaSalle County in trespass for an assault and battery. Sanderson pleaded not guilty and son assault demesne. A replication was filed, the cause was tried and Kelly had a verdict and a judgment for $300 from which Sanderson appeals. He argues that Kelly made the first assault; that, if not, he provoked the assault and thereby forfeited the right to exemplary damages; and that the sum allowed can only be sustained as exemplary damages; and that because of the provocation by Kelly, it was error to instruct the jury on the subject of exemplary damages.

In the center of a block in the city of Ottawa is a public court or square and from it an alley leads north to one street and south to another. Kelly lives on a lot that backs up against or by the side of said square and owns another lot next east of the north alley occupied by a tenant. Sanderson lives next west of the north alley with a barn facing on the court. The city had filled the court to some extent, by depositing material therein. The people whose lots adjoined the court had deposited ashes therein very generally and the court was higher than Kelly's adjoining lots and water from the court would flow upon his garden in the rear of his lot and on his tenant's lot. To avoid this Kelly had made an embankment with the ashes in the court near his property, some six or eight inches high, which prevented the water from running upon his property. Murray, Sanderson's hired man, on the day in question backed Sanderson's surrey out of the barn into the court to

Gen. No. 8383.

M. A. Kelly, appellee.

vs Appeal from LaSalle.

Charles Sanderson, appellant.

Dibell, J.

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In the center of a block in the city of Ottawa is a public court or square and from it an alley leads north to one street and south to another. Kelly lives on a lot that backs up against or by the side of said square and owns another lot next east of the north alley occupied by a tenant. Sanderson lives next west of the north alley and a barn looking on the court. The city had filled the court [illegible] with building material therein. The people where lots adjoined the court had leased them therein very generally. The court was higher than Kelly's adjoining lots [illegible] from [illegible] would flow upon his garden in the rear of his lot [illegible] tenant's lot. To avoid this Kelly had made an embankment with the same in the court near his property, some six eight inches high, which prevented the water from running upon his property. Murray, Sanderson's hired man, on the [illegible] in question backed Sanderson's survey out of the barn into the court to

hitch a horse to it, and found so much water in the court that he told Sanderson's little boy to open this dam and let the water through. The boy started to do ~~xx~~ it. Kelly came and ordered him away. He went and Sanderson came with a hoe. He began to dig an opening through the ashes. Kelly got a shovel and built up the barrier as fast as Sanderson hoed it down. According to the evidence introduced by Kelly, Sanderson then struck Kelly with the hoe on the front of Kelly's right leg, and then endeavored to strike him over the head with the hoe, but Kelly threw up an arm and warded off the blow from his head and received it on his shoulder. Then Sanderson struck Kelly a blow in the face with his fist. Then Kelly struck Sanderson on the side of the head with the falt side of the shovel. Then Kelly threw down his shovel and began a combat with his fists and Murray separated them. Sanderson introduced proof tending to show that Kelly was the first assailant. Sanderson testified that he did not remember striking Kelly with the hoe at all, but that the combat according to his recollection began ~~with~~ by Kelly striking Sanderson on the face with a shovel. There was an apparent preponderance of testimony in favor of Kelly. The blow with the blade of the hoe cut through Kelly's trousers and drawers and sock and cut a gash in his leg an inch deep and an inch and a half long. The jury believed the testimony introduced by Kelly and ~~dei~~ disbelieved that introduced by Sanderson. The trial judge approved the verdict. The evidence furnishes no ground for us to interfere with the conclusion of the jury. The injury testified to required the services of a physician or surgeon at different times for two weeks, and Kelly , who was a dentist, was ~~xxx~~ unable to attend to his patients for some little time. He carries a scar from the wound. At different times since, he has suffered pain after the wound healed. At the trial, eight months after the encounter, it had been two months since he had

ditch a horse to it, and found so much water in the court that he told Sanderson's little boy to open this ism and let the water through. The boy started to do as it. Kelly came and ordered him away. He went and Sanderson came with a hoe. He began to dig an opening through the ashes. Kelly got a shovel and built up the barrier as fast as Sanderson hoed it down. According to the evidence introduced by Kelly, Sanderson then struck Kelly with the hoe on the front of Kelly's right leg, and then endeavored to strike him over the head with the hoe, but Kelly threw up an arm and warded off the blow from his head and received it on his shoulder. Then Sanderson struck Kelly a blow in the face with his fist. Then Kelly struck Sanderson on the side of the head with the flat side of the shovel. Then Kelly threw down his shovel and began a combat with his fists and Murray separated them. Sanderson introduced proof tending to show that Kelly was the first assailant. Sanderson testified that he did not remember striking Kelly with the hoe at all, but that the combat according to his recollection began with by Kelly striking Sanderson on the face with a shovel. There was an apparent preponderance of testimony in favor of Kelly. The blow with the blade of the hoe o t rough Kelly's trousers and drawers and took and cut a gash in his leg on the inside and six inch and a half long. The jury believed the testimony introduced by Kelly and not the testimony introduced by Sanderson. The trial judge approved the verdict. The evidence warranted no ground for us to interfere with the conclusion of the jury. The injury testified to required the services of a physician on or between the different times for two weeks, and Kelly, who was a tailor, was unable to attend to his customers for more little time. He carried a scar from the wound. At the different trials, he has suffered with after the wound healed. At the trial, eight months after the encounter, it had been two months since he had

suffered pain in that place. Very likely the jury awarded something as exemplary damages.

The court gave an instruction on the subject of exemplary damages. It is not questioned but that it is a correct statement of the law on that subject. Appe lant contends that by building up this dam as fast as Sanderson dug it away, Kelly provoked the assault and therefore could not recover any exemplary damages, and therefore the court should not have given the instruction. Kelly might have very readily foreseen that Sanderson, as a result of his action, would bring the dam to the attention of the street authorities or of the city council or might sue him. We do not think that it necessarily follows that Kelly should have anticipated that Sanderson would make a ~~statmat~~ violent assault upon his person. It is not true that every provocation by a plaintiff deprives him of the right to exemplary damages for an assault by the person whom he has provoked. In Drohm v Brewer 77 Ill. 380 where the defendant in such a case asked an instruction depriving the plaintiff of the right to exemplary damages if the assault was made with considerable provocation and without malice, the court there said that, even if the assault was made with considerable provocation and without malice, yet if it was of a wanton, gross and outrageous character plaintiff might recover exemplary damages. That this is a question for the jury and not for the court is not only implied in that case, but also in Chicago Traction Co. v Mahoney, 330 Ill. 562. In order to refuse this instruction, the court must have determined from the evidence that there was a sufficient provocation so that Kelly ought tobe barred of exemplary damages. This was one of the issues which the jury were to decide and which the court could not take from them. Kelly was entitled to that instruction. In determining this question the jury

suffered pain in that place. Very likely the jury awarded something as exemplary damages.

The court gave an instruction on the subject of exemplary damages. It is not questioned but that it is a correct statement of the law on that subject. Appellant contends that by building up this dam as fast as Sanderson dug it away, Kelly provoked the assault and therefore could not recover any exemplary damages, and therefore the court should not have given the instruction. Kelly might have very reasonably foreseen that Sanderson, as a result of his action, would bring the dam to the attention of the street authorities or of the city council or might sue him. We do not think that it necessarily follows that Kelly should have anticipated that Sanderson would make a violent assault upon his person. It is not to be that every provocation by a plaintiff deprives him of the right to exemplary damages for an assault by the person whom he has provoked. In Drohm v Brewer 77 Ill. 380 where the defendant in such a case asked an instruction depriving the plaintiff of the right to exemplary damages if the assault was made with considerable provocation and without malice, the court there said that, even if the assault was made with considerable provocation and without malice, yet if it was of a wanton, gross and outrageous character plaintiff might recover exemplary damages. But this is a question for the jury and not for the court is not only implied in that case, but also in Chicago Traction Co. v Mooney, 88 Ill. 383. In order to warrant this instruction, the court must have determined from the evidence that there was sufficient provocation so that Kelly ought to be barred of exemplary damages. This was one of the issues which the jury were to decide and which the court could not take from them. Kelly was entitled to that instruction. In determining this question the jury

might have seen much in the demeanor of the respective parties upon the stand which aided them in determining whether the defendant was governed by malice in what he did. The exemplary damages assessed by the jury were moderate in amount.

The judgment is affirmed.

might have been much in the demeanor of the respective parties upon the stand which aided them in determining whether the defendant was governed by malice in what he did. The exemplary damages assessed by the jury were moderate in amount.

The judgment is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

2582

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

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204 I.A. 157

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and [illegible], within and for the Second District of the State of Illinois, present--the Hon. JOHN M. BIRDSONE, Presiding Justice,

Hon. DUANE L. CARNES, Justice,

Hon. DONNAWON PIERCE, Justice,

CHRISTOPHER C. BURTY, Clerk,

R. M. DAVIS, Sheriff,

BE IT REMEMBERED, [illegible]

[illegible] the Clerk's office on [illegible] Court, [illegible] following, to-wit:

Gen. No. 6388.

Harlan Watson, appellee

vs Appeal from Warren.

W. B. Lozier, appellant.

Dibell, J.

Appellee sued appellant before a justice of the peace in forcible detainer to recover possession of one hundred acres of land in Warren County and there was a verdict and a judgment against him and he appealed to the circuit court, where there was a verdict and a judgment for him, from which the defendant appeals.

Appellant contends that the court erred in overruling a motion for a continuance made by him. The bill of exceptions does not contain any motion for a continuance nor any proofs in support thereof, nor any denial of such a motion. The clerk cannot certify to the making of such motions nor the proof heard thereon nor the action of the court thereon, as is attempted in this case. Therefore no such question is presented by this record. Bromwell v Est. of Bromwell 139 Ill. 434.

It is alleged that the court erred in proceeding to a trial in the absence of the appellant. There is nothing in the bill of exceptions to show that the court did proceed to trial in the absence of appellant nor that his counsel made any objection to do doing. It is said in argument that appellants counsel refused to take any part in the trial. The bill of exceptions shows that they did announce during t e empaneling of the jury that they did not desire to take any further part in the trial, and also that at the close of plaintiffs evidence they advised the court that they did not desire to offer any evidence. But, nevertheless, they did take part in the trial, for they objected on behalf of appellant to certain evidence

Con. No. 6382.

Harlan Watson, appellee

vs. Appeal from Warren.

W. H. Loxter, appellant.

Dibell, J.

Appellee sued appellant before a justice of the peace in forcible detainer to recover possession of one hundred acres of land in Warren County and there was a verdict and a judgment against him and he appealed to the circuit court, where there was a verdict and a judgment for him, from which the defendant appeals.

Appellant contends that the court erred in overruling a motion for a continuance made by him. The bill of exceptions does not contain any motion for a continuance nor any proofs in support thereof, nor any denial of such a motion. The clerk cannot certify to the making of such motions nor the proof heard thereon nor the action of the court thereon, as is attempted in this case. Therefore no such question is presented by this record. Bromwell v. Tat. cf Bromwell 182 Ill. 444.

It is alleged that the court erred in proceeding to a trial in the absence of the appellant. There is nothing in the bill of exceptions to show that the court did proceed to trial in the absence of appellant nor that his counsel made any objection to doing. It is said in argument that upon learning counsel refused to take any part in the trial. The bill of exceptions shows that they did announce during the empaneling of the jury that they did not desire to take any further part in the trial, and also that at the close of plaintiffs evidence they advised the court that they did not desire to offer any evidence. But, nevertheless, they did take part in the trial, for they objected on behalf of appellant to certain evidence

offered by appellee and that objection was sustained.

The proofs show that H. N. Crosier leased these premises to appellant for the year from March 1, 1915, to March 1 1916, by a written instrument, dated October 20, 1914, and therein appellant agreed that at the expiration of the term of the lease, he would yield up possession to Crosier without further demand or notice. Appellant took possession under that lease and occupied the land. On October 20, 1915, Crozier leased the same premises to appellee for the year from March 1, 1916 to March 1, 1917. Appellant did not give up possession and on March 8, 1916, appellee unnecessarily served him with a written demand for possession and thereupon began this suit. Appellant retained possession. It is argued that the court erred in admitting in evidence the lease from Crozier to appellee. The lease from Crozier to appellant authorized Crozier to bring such an action in his own name. Under clause 4 of Section 3 of the Forcible Entry & Detainer Act, the person entitled to the possession of lands may be restored thereto by suit under that act when any lessee of lands holds possession without right after determination of the lease by its own terms. Appellee was entitled to offer the lease to himself to show that he was the person entitled to possession at the time he began the suit. Section 14 provides that the assignee of the lessor of any demise shall have the same remedy by entry, action or otherwise for the non-performance of any aggeement in the lease, as his grantor or lessor might have had, if the reversion had remained in said lessor or grantor. By the second lease appellee became the grantee within the meaning of said act. Bell v Chadwick, 46 Ill. 28; Floersheim v Baude, 110 Ill. App. 536; Grand Union Tea Co. v Hanna, 164 Ill. App. 570. The evidence established the signatures to these instruments and made a case for appellee and the court, in the absence of any proof by appellant, properly

Tenants act

offered by appellee and that objection was sustained.

The proofs show that H. M. Crozier leased these premises to appellant for the year from March 1, 1915, to March 1 1916, by a written instrument, dated October 20, 1914, and therein appellant agreed that at the expiration of the term of the lease, he would yield up possession to Crozier without further demand or notice. Appellant took possession under that lease and occupied the land. On October 20, 1915, Crozier leased the same premises to appellee for the year from March 1, 1916 to March 1, 1917. Appellant did not give up possession and on March 8, 1916, appellee unnecessarily served him with a written demand for possession and thereupon began this suit. Appellant retained possession. It is argued that the court erred in admitting in evidence the lease from Crozier to appellee. The lease from Crozier to appellant authorized Crozier to bring such an action in his own name. Under clause 4 of Section 3 of the Forcible Entry & Detainer Act, the person entitled to the possession of lands may be restored thereto by suit under that act when any lessee of lands holds possession without right after determination of the lease by its own terms. Appellee is entitled to offer the lease to himself to show that he was the person entitled to possession at the time he began the suit. Section 14 provides that the assignee of the lessor of any de lea shall have the same remedy by entry, action or otherwise for the non-performance of any agreement in the lease, as the grantor or lessor might have had, if the reversion had remained in said lessor or grantor. By the second lease [illegible] became the grantee within the meaning of said act. [illegible] v. Chadwick, 48 Ill. 28; Floersheim v Burke, 110 Ill. App. [illegible]; Grand Union Tea Co. v Hanna, 181 Ill. App. 570. [illegible] evidence established the signatures to these instruments [illegible] a case for appellee and the court, in the absence of any [illegible] by appellant, properly

directed a verdict for appellee, and the record shows no reason why the court should have granted a new trial.

The judgment is therefore affirmed.

directed a verdict for appellee, and the record shows no reason why the court should have granted a new trial.

The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

2583

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. , Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

204 I.A. 158

BE IT REMEMBERED, that afterwards, to-wit: on the 27th day of October, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

A T E R M O F T H E A P P E L L A T E C O U R T,

[illegible]on and held at Ottawa, on Tuesday, the seventh day of April,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:

[illegible]esent--The Hon. DUANE L. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. [illegible], Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

BE IT REMEMBERED, [illegible]
[illegible] October, A. D. 1914, [illegible]
[illegible] the Clerk's office of said court, [illegible]
following, to-wit:

Gen. No. 6396.

Irene Faletti, Admrx. appellee

vs Appeal from Putnam.

W. L. Child, appellant.

Dibell, J.

Irene Faletti, Administratrix de bonis non of the estate of Edward McCabe, deceased, brought this suit against W. L. Child in the Circuit Court of Putnam County and filed a declaration containing the common counts, and therewith an affidavit of claim, which stated that the demand of plaintiff was for money lent by McCabe to defendant and interest thereon, which money and interest was still unpaid, and for moneys of McCabe collected by Child in the lifetime of McCabe from parties owing McCabe and which had never been accounted for or paidto McCabe or his estate, and that there is due to plaintiff from defendant $1,000. Child filed pleas of the general issue, the Statute of Limitations, and that the transactions related to a partnership and were not all the transactions of the partnership and that the affairs of the partnership had never been settled. With this appellant filed an affidavit of merits. There was a jury trial and a verdict and a judgment for plaintiff in the sum of $795.83, from which defendant appeals.

Pursuant to an order of court appellee filed a bill of particulars, the firts item of which concerned a certain check for $600 which it said was money lent by McCabe to Child and cashed by Child; and the second was for certain moneys arising from the sale of two teams of mules by Child, which were alleged to have been the property of McCabe. There were three other items in the bill of particulars, one of $35.00 one of $100.00 and one of $82.50. The evidence at the trial was confined to the first two items. Appellant argues that the verdict was for the amount of the check. Appellee argues that that conclusion

Gen. No. 8396.

Irene Falatti, Admrx. appellee

vs

Appeal from Putnam.

W. L. Child, appellant.

Dibell, J.

Irene Falatti, Administratrix de bonis non of the estate of Edward McCabe, deceased, brought this suit against W. L. Child in the Circuit Court of Putnam County and filed a declaration containing the common counts, and therewith an affidavit of claim, which stated that the demand of plaintiff was for money lent by McCabe to defendant and interest thereon, which money and interest was still unpaid, and for money of McCabe collected by Child in the lifetime of McCabe from parties owing McCabe and which had never been accounted for or paid to McCabe or his estate, and that there is due to plaintiff from defendant $1,000. Child filed pleas of the general issue, the Statute of Limitations, and that the transactions related to a partnership and were not all the transactions of the partnership and that the affairs of the partnership had never been settled.

With this appellant filed an affidavit of merits. There was a jury trial and a verdict and a judgment for plaintiff in the sum of $795.83, from which defendant appeals.

Pursuant to an order of court appellee filed a bill of particulars, the first item of which consisted of certain checks for $800 which it said was money lent by McCabe to Child and cashed by Child; and the second was for certain moneys arising from the sale of two teams of mules by Child, which were alleged to have been the property of McCabe. There were three other items in the bill of particulars, one of $[illegible], one of $100.00 and one of $88.50. The evidence at the trial was confined to the first two items. Appellant argues that the verdict was for the amount of the check. Appellee argues that that conclusion

cannot be drawn from the record. We are satisfied that the verdict was upon the check only. The verdict is just the amount of the check, with interest at five per cent from the date of the check to the date of the verdict. There was no reason why the whole check should not be allowed, if any of it. The proof concerning the mules would not authorize so large a verdict and if the verdict was based upon the mules ~~xxxx~~ alone, it is excessive.

The check was drawn by McCabe in favor of Child on the Spring Valley City Bank, was dated October 12, 1909, and was for $600. Appellee contends that by his affidavit of merits, appellant stated as his only defense to that item that he never received the $600; and that under the statute that statement excluded all other defences. This is a misapprehension of the affidavit of merits. The affidavit stated on that subject that McCabe never loaned appellant $600 on October 12, 1909, nor does appellant owe McCabe or his legal representative said sum, with interest from October 12, 1909, and that appellant does not owe appellee for any money lent or advanced, paid out for or in behalf of appellant, or for any sum of money set out in the declaration. The bare fact that appellant received this check from McCabe and obtained the money upon it does not create the presumption that McCabe loaned appellant $600 but the ordinary presumption is that the money was paid because it was due and owing by McCabe to appellant. Bromwell v Estate of Bromwell, 139 Ill. 424. To the same effect was Kinahan v Butler, 133 Ill. App. 459; and MacKenzie v Barrett , 148 Ill. App. 414. In Miller & Graves v Pratz, 179 Ill. App. 204, we followed these and other decisions and held that "where one pays money or delivers a check for money to another and there is no explanation of the cause of such payment, or if business

cannot be drawn from the record. We are satisfied that the verdict was upon the check only. The verdict is just the amount of the check, with interest at five per cent from the date of the check to the date of the verdict. There was no reason why the whole check should not be allowed, if any of it. The proof concerning the mules would not authorize so large a verdict and if the verdict was based upon the mules alone, it is excessive.

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relations only exist between the parties, the ordinary presumption is that the money was paid because it was due and owing." The only debatable question in this case is whether the evidence overcomes this presumption. Antone Faletti testified that he was present at an interview between Mrs. McCabe, C. N. Hatterich, appellant and his wife, after the death of McCabe at which Mrs. McCabe held in one hand a certain book, apparently a book of accounts which is not in evidence, and in the other hand this check, and said to appellant that Mr. McCabe had an account against him and that she would like to have it settled and that there were some mules, some horses and $600 that McCabe had advanced by check and she handed the check to appellant and he looked at it and said: "Yes, I got that money;" that Mrs. McCabe then said to appellant: "Why dont you pay it if you got it;" and appellant then said something which the witness could not understand and Mrs. McCabe got angry and excited, and the three men went away and had another conversation elsewhere which was not offered in evidence. That appellant got the money on the check has no tendency to show that it was a loan to appellant. The argument of appellee is that as Mrs. McCabe said to appellant that McCabe had advanced the money by check and as appellant said "Yes" this showed that he thereby admitted that it was an advancement. Twice thereafter during the direct examination of the witness appellee's counsel asked him to repeat what appellant said and each time he left out the word "Yes" and only gave that answer as "I received the money". Appellant was a competent witness as to that conversation and he says that what he said in addition which the witness Faletti did not understand, was that he told Mrs. McCabe that he did not owe McCabe's estate anything. Faletti having twice omitted the word "Yes" in his answer,

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tion is that the money was paid because it was due and owing."
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dence overcomes this presumption. Antone Yalcitti testified
that he was present at an interview between Mrs. McCabe, O. K.
Hatterich, appellant and his wife, after the death of McCabe
at which Mrs. McCabe held in one hand a certain book, or pretty
a book of accounts which is not in evidence, and in the other
hand this check. And said to appellant that Mr. McCabe had an
account against him and that she would like to have it settled
and that there were some mules, some horses and $300 that Mc-
Cabe had advanced by check and she handed the check to appel-
lant and he looked at it and said: "Yes, I got that money;"
that Mrs. McCabe then said to appellant: "Why don't you say it
if you got it;" and appellant then said something [illegible] the
witness could not understand and Mrs. McCabe got angry and
excited, and the three men went away [illegible] conver-
sation elsewhere which was not of [illegible] in evidence. [illegible] appel-
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it was a loan to appellant. The argument [illegible]
as Mrs. McCabe said to appellant that McC[illegible]
money by check and he [illegible] said "Yes" [illegible]
be thereby admitted [illegible]
after having the direct examination [illegible]
counsel asked him to [illegible]
he left out the word "Yes" [illegible]
received the money". Appellant [illegible]
that conversation [illegible]
which the three Italians [illegible]
Mrs. McCabe that he did not owe [illegible]
Yalcitti having twice omitted [illegible] "Yes" in his [illegible]

we are of opinion th t the jury were not warranted in finding that appellant admitted in that conversation that McCabe advanced this $600 to him. Therefore we are of opinion that the evidence did not make a case for appellee. As the case must be tried again, we suggest that an instruction given for plaintiff that stated that this $600 item was based on the check in evidence was calculated to mislead, as in order to sustain that item it was necessary, not merely to show the check, but also that it was an advancement or loan to appellant.

The judgment is therefore reversed and the cause remanded.

we are of opinion th t the jury were not warranted in finding that appellant admitted in that conversation that McCabe advanced this $800 to him. Therefore we are of opinion that the evidence will not make a case for appellee. As the case must be tried again, we suggest that an instruction given for plaintiff that stated that this $800 item was based on the check in evidence was calculated to mislead, as in order to sustain that item it was necessary, not merely to show the check, but also that it was an advancement or loan to appellant.

The judgment is therefore reversed and the cause remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 6th day of January, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures fowllowing, to-wit:

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE L. CARNES, Presiding Justice.

Hon. NORMAN L. DIBELL, Justice.

Hon. JOHN M. NICHOLS, Justice.

CHRISTOPHER C. DUNNY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED that on the [illegible] day of January, A. D. 1915, [illegible] the Clerk's office [illegible] following, to-wit:

Gen. No. 6403.

Emma Griggs, appellee

vs Appeal from Grundy.

A. R. Griggs, et al.

(John G. Petteys, appellant.)

Dibell, J.

Emma Griggs filed a bill in equity against A. R. Griggs and his attorney John G. Petteys. She afterwards amended the bill and thereafter applied for a temporary injunction. Petteys was the only defendant served, as defendant Griggs lived in Iowa. A change of venue was asked for and denied. The injunction was granted and an injunction bond filed. This is an appeal by Petteys from the interlocutory order granting the temporary injunction.

Appellant argues that the court erred in denying his application for a change of venue, and that, if the change of venue was improperly refused or should have been granted, then the presiding judge had no jurisdiction to grant this injunction, and the order is therefore void, and hence, on this appeal from this interlocutory order granting an injunction, he may raise the question of the prior error. If counsel is correct in this, which we do not decide, yet the question argued is not presented. The abstract only shows that a petition for a change of venue was filed and denied. It does not show the contents of the petition nor whether a change of venue was sought from the county or from some one or all of the judges. It does not show what ground for a change of venue was alleged. A verification of the petition is not shown. It is familiar doctrine that any error alleged on appeal must be shown in the abstract and that the court will not search the record to find some error, which

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vs. Appeal from Grundy.

A. R. Griggs, et al.

(John G. Pettys, appellant.)

Dibell, J.

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Appellant argues that the court erred in denying his application for a change of venue, and that, if the change of venue was improperly refused or should have been granted, then the presiding judge had no jurisdiction to grant this injunction, and the order is therefore void, and hence, on this appeal from this interlocutory order granting an injunction, he may raise the question of the prior error. If counsel is correct in this, which we do not decide, yet the question argued is not presented. The abstract only shows that a petition for a change of venue was filed and denied. It does not show the grounds of the petition nor whether a change of venue was sought from the county or from some one or all of the judges. It does not show what ground for a change of venue was alleged. A verification of the petition is not shown. It is familiar doctrine that any error alleged on appeal must be shown in the abstract and that the court will not search the record to find some error, which

has not been shown in the abstract. Moreover, petitions and motions for a change of venue and affidavits in support of the same and the ruling of the court thereon, can only be made a part of the record by being incorporated in the bill of exceptions or certificate of evidence. People v Ellsworth, 261 Ill. 275; Macierzpolska v Czarhecki, 272 Ill. 34, and cases cited in those opinions. This rule applies to chancery cases as well as actions at law. Heacock v Hosmer, 109 Ill. 345; Duquoin Water Works Co. v Parks, 207 Ill. 46. This record contains no certificate of evidence, embodying said petition and affidavit and the order of the court. The record therefore does not show any error in refusing the change of venue.

The bill alleged that Mrs. Griggs was seventy six years old and a widow; that she owned a life estate in six pieces of real estate in or near Morris; and that there were four dwelling houses on said tracts, bringing her an average rental of $32.00 per month, and the rest of the tracts brought her $55 rent per year, and that she has a homestead on said premises; that in September last, her son, A. R. Griggs, requested her to go to the law office of Petteys and she did so, and that when she arrived there A. R. Griggs and Petteys told her that they would get her son, Bert Griggs, out of the asylum at Kankakee, but that they wanted her to assign sufficient rents to pay therefor, and presented her a paper which they represented was a powerof attorney to A. R. Griggs to collect said rent for a short time to pay said expenses; that she depended on said representations and believed them to be true and signed the paper; that shortly thereafter she borrowed from the bank and paid A. R. Griggs $50.00 to cover such expenses; that A. R. Griggs filed said instrument for record, and she thereafter learned that it was a lease to A. R. Griggs of all said premises for twenty years;

has not been shown in the abstract. Moreover, petitions and motions for a change of venue and affidavits in support of the same and the ruling of the court thereon, can only be made a part of the record by being incorporated in the bill of exceptions or certificate of evidence. People v Ellsworth, 261 Ill. 275; Mcclerzpolska v Czarbosk, 275 Ill. 94, and cases cited in those opinions. This rule applies to chancery cases as well as actions at law. Hescock v Hosmer, 108 Ill. 245; Dupuoin Water Works Co. v Parks, 207 Ill. 46. This record contains no certificate of evidence, embodying said petition and affidavit and the order of the court. The record therefore does not show any error in refusing the change of venue.

The bill alleged that Mrs. Griggs was twenty six years old and a widow; that she owned a life estate in six pieces of real estate in or near Morris; that there were four dwelling houses on said tracts, bringing her an average rental of $25.00 per month, and the rest of the tracts brought her $15 rent per year, and that she has a homestead on said premises; that in September last, her son, A. R. Griggs, requested her to go to the law office of Pettey [illegible] so, [illegible] when she arrived there A. R. Griggs and Pettey told her that they could get her son, Bert Griggs, out of the asylum at [illegible], but that they wanted her to sign an instrument [illegible] for, and presented her a paper which they represented [illegible] power of attorney to A. R. Griggs to sell [illegible] time to pay said ex emse; that she listened on a [illegible] and believed them to be [illegible] shortly thereafter she borrowed [illegible] Griggs $50.00 to cover such expenses; [illegible] instrument for record, [illegible] that it was a lease to A. R. Griggs of all [illegible] remainder [illegible]

that Petteys acting for Griggs, collected the rents as they became due and paid her a part thereof, and retained the rest, and that, even if this were a valid lease, A. R. Griggs had defaulted therein by failing to pay her the rent therein agreed and that A. R. Griggs is now endeavoring to get her out of the possession of the premises. She alleged that her signature to said paper was obtained by the fraud and misrepresentationof A. R. Griggs and Petteys. She asked that the lease be cancelled and that Petteys and Griggs be restrained from collecting the rent. We are of opinion that these averments authorized a temporary injunction.

It is argued that the bill does not pray for a temporary injunction. It does not in those exact words, but it does pray that the defendants be restrained from collecting the rents or from interfering with the property till the further order of the court, and that means a temporary injunction. It is argued that the bill is not verified. There is an affidavit of complainant to the original bill, in which she stated that she ~~xxx xxxxx~~ has heard it read and that the same is true in substance and fact. There is an affidavit to the amendment, in which she says that she has read it and that the allegations therein contained are true in substance and in fact.

The order is affirmed.

that Pettoye acting for Griggs, collected the rents as they became due and paid her a part thereof, and retained the rest, and that, even if this were a valid lease, A. R. Griggs had defaulted therein by failing to pay her the rent therein agreed and that A. R. Griggs is now endeavoring to get her out of the possession of the premises. She alleged that her signature to said paper was obtained by the fraud and misrepresentationof A. R. Griggs and Pettoye. She asked that the lease be cancelled and that Pettoye and Griggs be restrained from collecting the rent. We are of opinion that these averments authorized a temporary injunction.

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The order is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

121 - 22064

CITY OF CHICAGO,
Defendant in Error,

vs.

VICTOR BISSO,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

204 I.A. 162

MR. PRESIDING JUSTICE McCURDY
DELIVERED THE OPINION OF THE COURT.

Defendant was tried by a jury and found guilty of conducting a disorderly house in violation of section 2019 of the Municipal Code of Chicago. Upon a verdict he was fined $100.

It is sought to have the judgment reversed (1) on the ground that a motion for a change of venue was improperly denied. We cannot pass upon this for the reason that it has not been properly preserved for our review. Section 23 of the Municipal Court Act with reference to cases of this kind provides that parties desiring to preserve such matters for review should do so by making "a correct statement of such other proceedings in the case as such party may desire to have reviewed." There has been an attempt made to preserve the proceedings upon this motion in what is called a bill of exceptions, which is not in accordance with the statute. Furthermore, even if we should consider the matters appearing in this document it would not avail the defendant, for the reason that it appears that the affidavits supporting the motion for change of venue were sworn to before the defendant's attorney in the case. Such affidavits will

not be received or considered by the court. "By the general practice of all the courts, affidavits sworn before the attorney or solicitor in the cause cannot be read." Tidd's Practice 494; see, also, City v. Simonetti, this court No. 22600, opinion filed January 22, 1917, and cases therein cited.

(2) It is said that plaintiff failed to prove its case. In our view of the evidence, which it is unnecessary to detail and some of it too vulgar to print, the charge was amply sustained. Moreover, we must assume the sufficiency of the evidence to support the charges made, for the reason that the ordinance which the defendant is charged with having violated is not before us. We cannot take judicial notice of this, and must therefore presume the correctness of the verdict. Simonetti case, supra, and cases therein cited.

We are not of the opinion that it constitutes reversible error for the court to curtail time for argument of a motion for a new trial.

There appearing no substantial grounds for reversal, the judgment is affirmed.

AFFIRMED.

not be received or considered by the court. "By the general practice of all the courts, affidavits sworn before the attorney or solicitor in the cause cannot be read." Tidd's Practice 424; see, also, City v. Simonetti, this court No. 22600, opinion filed January 22, 1919, and cases therein cited.

(2) It is said that plaintiff failed to prove its case. In our view of the evidence, which it is unnecessary to detail and some of it too vulgar to print, the charge was amply sustained. Moreover, we must assume the sufficiency of the evidence to support the charges made, for the reason that the ordinance under the defendant is charged with having violated is not before us. We cannot take judicial notice of this, and must therefore presume the correctness of the verdict. Simonetti case, supra, and cases therein cited.

We are not of the opinion that it constitutes reversible error for the court to curtail time for argument of a motion for a new trial.

There appearing no substantial grounds for reversal, the judgment is affirmed.

AFFIRMED.

122 - 22065

204 I.A. 163

CITY OF CHICAGO,
Defendant in Error,

vs.

VICTOR BISSO,
Plaintiff in Error,

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is a companion case to the case of the same title, No. 22064, opinion in which is this day filed.

Here the defendant was charged with violation of section 1539 of the Municipal Code of Chicago, found guilty by a jury, and judgment entered on the verdict. What we said in the opinion in case No. 22064 is applicable to the instant case. The proceedings on the motion for change of venue have not been properly preserved for our review. The affidavits in support of the motion were made before the attorney in the case. The evidence is sufficient to sustain the complaint, although in the absence of the ordinance charged to be violated its sufficiency will be presumed.

There is no reversible error in the refusal of the court to allow further time for argument on the motion for a new trial.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

122 - 22026

204 I.A. 123

CITY OF CHICAGO,
Defendant in Error,

vs.

VICTOR HUGO,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MCSURLEY
DELIVERED THE OPINION OF THE COURT.

This is a companion case to the case of the same title, No. 22024, opinion in which is this day filed.

Here the defendant was charged with violation of section 1527 of the Municipal Code of Chicago, found guilty by a jury, and judgment entered on the verdict. That we said in the opinion in case No. 22024 is applicable to the instant case. The proceedings on the motion for change of venue have not been properly preserved for our review. The affidavits in support of the motion were made before the attorney in the case. The evidence is sufficient to sustain the complaint, although in the absence of the ordinance charged to be violated its sufficiency will be presumed.

There is no reversible error in the refusal of the court to allow further time for argument on the motion for a new trial.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

123 - 22066

CITY OF CHICAGO,
Defendant in Error,

vs.

EMMA SIMONETTI,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

204 I.A. 164

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant was charged with keeping a dram shop and selling liquor in less quantities than a gallon, in violation of section 1539 of the Municipal Code of Chicago. A jury found her guilty and a judgment was entered fining her $50.

Many things which we have said in the opinion in City v. Simonetti, No. 22600, opinion filed January 22, 1917, are applicable to the instant case. The proceedings upon the motion for a change of venue have not been properly preserved for our review in compliance with the statute requiring that this should be done by "a correct statement of such other proceedings in the case as such party may desire to have reviewed by the Appellate Court." Section 23 of the Municipal Court Act.

From the document filed, which is called a bill of exceptions, it appears that the notary public before whom the affidavits were sworn to was the attorney representing the defendant upon the trial. Such affidavits, as we have held in the Simonetti case, supra, should not be received by the court.

We are of the opinion that the testimony amply supported the verdict, and in any event we must presume its

123 - 22006

CITY OF CHICAGO, Defendant in Error,	ERROR TO MUNICIPAL COURT OF CHICAGO.
vs.	
ROSA SIMONETTI, Plaintiff in Error.	

2041A.104

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

Defendant was charged with keeping a drug shop and selling liquor in less quantities than a gallon, in violation of section 1339 of the municipal code of Chicago. A jury found her guilty and a judgment was entered fining her $50.

Many things which we have said in the opinion in City v. Simonetti, No. 22006, opinion filed January 18, 1917, are applicable to the instant case. The proceedings upon the motion for a change of venue have not been properly preserved for our review in compliance with the statute requiring that this should be done by a correct statement of such other proceedings in the case as such party may desire to have reviewed by the Appellate Court." Section 23 of the Municipal Court Act.

Upon the document filed, which is rather a bill of exceptions, it appears that the county judge before whom the affidavits were known [illegible] the defendant upon the trial. [illegible] held in the Simonetti case, supra, [illegible] by the court.

We are of the opinion that the last jury [illegible] supported the verdict, and in any event we [illegible]

sufficiency in the absence from the record of the ordinance charged to be violated. See City v. Tearney, 187 Ill. App. 441, City v. Kohn, 195 Ill. App. 399, and other cases cited in the Simonetti case, supra.

We do not find that the record supports the claim that two cases were tried against the defendant by the same jury at the same time and the jury sworn only once, and defendant allowed only five peremptory challenges.

There does not appear to have been any reversible error, and the judgment is affirmed.

AFFIRMED.

sufficiency in the absence from the record of the ordinance charged to be violated. See City v. Tenney, 157 Ill. App. 441. City v. Kohn, 195 Ill. App. 389, and other cases cited in the Clementi case, supra.

We do not find that the record supports the claim that two cases were tried against the defendant by the same jury at the same time and the jury sworn only once, and defendant allowed only five peremptory challenges.

There does not appear to have been any reversible error, and the judgment is affirmed.

AFFIRMED.

127 - 22550

CHICAGO & RIVERDALE LUMBER COMPANY, a corporation,
Defendant in Error,

vs.

EDWARD F. QUINLIVEN,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

204 I.A. 166

MR. PRESIDING JUSTICE McSURLY
DELIVERED THE OPINION OF THE COURT.

Plaintiff sold lumber to a general contractor named Hellinga, which was used in remodeling a building belonging to the defendant, Quinliven, in accordance with a contract between Quinliven and Hellinga. Plaintiff, not being paid, brought suit against the contractor and owner jointly for the amount due it (section 28 Mechanics' Lien law, Hurd), and upon a directed verdict had judgment for $370.07. Quinliven by order of severance prosecutes this writ of error alone.

It is presented by defendant as a defense that plaintiff has created an estoppel against its right to sue defendant because of an occurrence which defendant says was as follows: that he asked a man named Ahrends, in charge of sales and collections at a branch office of the plaintiff, for a bill for the lumber used in his building; that Ahrends said it would take a couple of days before the bill would be ready; that, defendant testifies, "I says to that, 'when I make the check out will I make it out to the Chicago and Riverdale Lumber Company or Mr. Hellinga,' and he told me to make the check out to Mr. Hellinga. He says, 'only one thing I ask you to do when you do make it out is to call this office

127 - 25550

CHICAGO & RIVERDALE LUMBER COMPANY, a corporation,
Defendant in Error,

vs.

EDWARD P. QUINLIVEN,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

9 0 4 I A . 1 5 6

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sold lumber to a general contractor named Hellings, which was used in remodeling a building belonging to the defendant, Quinliven, in accordance with a contract between Quinliven and Hellings. Plaintiff, not being paid, brought suit against the contractor and owner jointly for the amount due it (section 15 Mechanics' Lien law, Hurd), and upon a directed verdict had judgment for $270.07. Quinliven by order of supervisors prosecutes this writ of error alone.

It is presented by defendant as a defense that plaintiff has created an estop of against its right to sue defendant because of an occurrence which defendant says was as follows: that he sent a man named Dr vis, in charge of sales and collections of a branch office of the plaintiff, for a bill for the lumber used in his building; that Dr vis said it would take a couple of days to see if his bill would be ready; that, before he left, he, "I says to him, 'when I make the check out will I make it out to the Riverdale and Riverdale Lumber Company or to Hellings,' and he told me to make the check out to Mr. Hellings. He says, 'only one thing I ask you to do when you do make it out is to call this office

and let me know when you give it to him,' which I did." Ahrends denies that any of the above language in quotation marks was used. Subsequently plaintiff sent the bill to Hellinga, and within ten days of the delivery of the last material by plaintiff the defendant paid Hellinga an amount of money considerably in excess of what was due plaintiff, without taking any contractor's statement from Hellinga and without requesting from either Hellinga or the plaintiff a waiver of lien.

Even upon the questionable assumption that anything Ahrends might do in regard to waiving plaintiff's right to a lien could bind plaintiff or void its statutory remedy, the language ascribed to him by defendant is ineffective for such purpose. Defendant's contract with Hellinga covered both labor and material; plaintiff's account for lumber was with Hellinga; so that if Ahrends told defendant to pay Hellinga whatever might be due for lumber he only stated defendant's legal obligation under his contract, and this the defendant well knew. The element of fraud on the part of the plaintiff was wholly lacking, and if, as is claimed, there has been a fraudulent result, this may be more properly attributed to the conduct of the defendant, who knew, or in law was bound to know, that any payment made by him to Hellinga without taking a contractor's statement and after notice of plaintiff's claim, or within 60 days of the date when the material man's lien rights accrued, was in fraud of plaintiff's claim.

As nothing amounting to a waiver or abandonment of a lien has been shown, nor any conduct operating as an estoppel of plaintiff's right under the statute, the judgment is affirmed.

AFFIRMED.

and let me know when you give it to him,' which I did." Ahrenda denies that any of the above language in quotation marks was used. Subsequently plaintiff sent the bill to Hellings, and within ten days of the delivery of the last material by plaintiff the defendant paid Hellings an amount of money considerably in excess of what was due plaintiff, without taking any contractor's statement from Hellings and without requesting from either Hellings or the plaintiff a waiver of lien.

Even upon the questionable assumption that anything Ahrenda might do in regard to waiving plaintiff's rights to a lien could bind plaintiff or void its statutory remedy, the language ascribed to him by defendant is ineffective for such purpose. Defendant's contract with Hellings covered both labor and material; plaintiff's account for labor was with Hellings; so that if Ahrenda told defendant to pay Hellings whatever might be due for lumber he only stated defendant's legal obligation under his contract, and this the defendant well knew. The element of fraud on the part of the plaintiff was wholly lacking, and if, as is claimed, there has been a fraudulent result, this may be more properly attributed to the conduct of the defendant, who knew, or in law was bound to know, that any payment made by him to Hellings without taking a contractor's statement and after notice of plaintiff's claim, or within 60 days after the date of work the material and lien rights accrued, was in fraud of plaintiff's claim.

No nothing amounting to a waiver or abandonment of a lien has been shown, nor any conduct upon which an estoppel of plaintiff's right under the statute, was judgment is affirmed.

AFFIRMED.

188 - 22615

FREDERICK BAUSMAN, for the use of W. J. SELLECK and MARIA BORDEN, Executrix of the Estate of HAMILTON BORDEN, deceased, Appellee,

vs.

JOHN A. MEAD and CARL B. HINSMAN, Appellants.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

204 I.A. 167

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

On October 9, 1913, upon a consideration of the facts appearing upon a former trial of this case, an opinion was filed by one of the branches of this court adjudging that the judgment be reversed and the cause remanded - 182 Ill. App. 35, No. 18435. The case was redocketed in the Circuit Court; two other suits on the same cause of action had been brought, one in the name of Hamilton Borden and one in the name of William J. Selleck, and by agreement all three cases were consolidated under one case, which was submitted to the court for trial without a jury. After trial judgment was entered against defendants, assessing plaintiffs' damages in the sum of $6,885, part for the use of Selleck and part for the use of Borden, executrix. By this present appeal defendants seek the reversal of this judgment.

In the prior opinion in this case will be found rather a full statement of the facts necessary to an understanding of the points in controversy. We here repeat that statement in part:

This is an appeal from a judgment against Carl B. Hinsman in an action of debt on a penal bond given by John A. Mead as principal, and Carl B. Hinsman as surety, to Frederick

WENDELICK KAUFMAN, for the use of W. J. BALLOCK and MARIA BORDEN, Executrix of the Estate of HAMILTON BORDEN, deceased, Appellee,	
vs.	APPEAL FROM CIRCUIT COURT,
JOHN A. MEAD and CARL B. HINMAN, Appellants.	COOK COUNTY.

SYLLABUS

MR. PRESIDING JUSTICE McSURELY

DELIVERED THE OPINION OF THE COURT.

On October 9, 1915, upon a consideration of the facts appearing upon a former trial of this case, an opinion was filed by one of the branches of this court adjudging that the judgment be reversed and the cause remanded - 185 Ill. App. 25, No. 18435. The case was redocketed in the Circuit Court; two other suits on the same cause of action had been brought, one in the name of Hamilton Borden and one in the name of William J. Ballock, and by agreement all three cases were consolidated under one case, which was submitted to the court for trial without a jury. After trial judgment was entered against defendants, assessing plaintiffs' damages in the sum of $8,888, part for the use of Ballock and part for the use of Borden, executrix. By this present appeal defendants seek the reversal of this judgment.

In the prior opinion in this case will be found rather a full statement of the facts necessary to an understanding of the points in controversy. We here repeat that statement in part:

This is an appeal from a judgment against Carl B. Hinman in an action of debt on a penal bond given by John A. Mead as principal, and Carl B. Hinman as surety, to Wendelick

Bausman as trustee in bankruptcy of the Alaska Smelting Company, in connection with the sale of a smelter belonging to the said bankrupt, made in pursuance of an order of the United States District Court for the Western District of Washington, in the matter of said Alaska Smelting Company, bankrupt, No. 3547.

The smelter, which was the only property of the bankrupt, was incumbered by a mortgage given to secure a bond issue of $300,000. At or about the time the Smelter Company was adjudged bankrupt, which was in October, 1907, Bausman, the trustee in bankruptcy, and a Mr. Gould, the attorney for Mead, who was the owner of a large part of said bond issue, and a Mr. Blanc, representing a creditor who had advanced about $50,000 to the bankrupt, met in New York City, and the statement was then made that the trust deed given to secure said bonds was invalid and that the bonds were invalid, and that this creditor represented by Mr. Blanc would insist upon proceedings being instituted to have said trust deed and bonds adjudged void. A short time thereafter Gould met Bausman in Seattle, Washington, and the trustee stated that he could not continue carrying the smelter, and that he would insist upon being given authority to sell it; that if Mead chose to bid upon the property, he would consent to an order that his bonds be allowed at 33-1/3 per cent of their face value as part of the purchase price, upon the assumption that said bonds were valid, provided Mead would give an indemnity bond in the sum of $20,000, which it was thought would be sufficient to meet the claim of $50,000 held by Mr. Blanc's client; so that if the proceeding to set aside the trust deed should be instituted and prevail, such creditor would be equal or superior in rank to Mead, and said indemnity

Bausman as trustee in bankruptcy of the Alaska Smelting Company, in connection with the sale of a smelter belonging to the said bankrupt, made in pursuance of an order of the United States District Court for the Western District of Washington, in the matter of said Alaska Smelting Company, bankrupt, No. 3347.

The smelter, which was the only property of the bankrupt, was incumbered by a mortgage given to secure a bond issue of $300,000. At or about the time the Smelter Company was adjudged bankrupt, which was in October, 1907, Bausman, the trustee in bankruptcy, and a Mr. Gould, the attorney for Ladd, who was the owner of a large part of said bond issue, and a Mr. Blanc, representing a creditor who had advanced about $50,000 to the bankrupt, met in New York City, and the statement was then made that the trust deed given to secure said bonds was invalid and that the bonds were invalid, and that this creditor represented by Mr. Blanc would insist upon proceedings being instituted to have said trust deed and bonds adjudged void. A short time thereafter Gould met Bausman in Seattle, Washington, and the trustee stated that he could not continue carrying the matter, and that he would insist upon being given authority to sell it; that if Ladd came to bid upon the property, he would consent to an order that his bonds be allowed at 35-1/3 per cent of their face value as part of the purchase price, upon the assumption that said bonds were valid, provided Ladd would give an indemnity bond in the sum of $50,000, which it was thought would be sufficient to meet the claim of $50,000 held by Mr. Blanc's client; so that if the proceeding to set aside the trust deed should be instituted and prevail, such creditor would be equal or superior in rank to Ladd, and said indemnity

bond should be held for the common benefit of every legal creditor of the bankrupt.

Upon that statement and upon the entry of an order providing for the sale of the smelter, Gould stated that he would advise the giving of the bond conditioned to meet the claim of any lawful creditor, if that creditor should prove his equality or priority to Mead's claim. Accordingly an order of sale of said property was entered on March 21, 1908, directing the sale of the property, providing that the bidder whose bid should be accepted should pay all of the remainder of his bid above $6,000 either in cash or in mortgage bonds at 33-1/3 per cent of their face value, and that if the successful bidder should tender such mortgage bonds in payment of the balance of the bid, in lieu of such cash, and his bid should be accepted, he should furnish security for the payment of creditors in the sum of $20,000.

On April 7, 1908, the bid of Mead, for said property, of $87,000, payable $6,000 in cash and the balance by the surrender of mortgage bonds of the face value of $243,000 was accepted, said bonds being received as part of said purchase price on the basis of 33-1/3 per cent of their face value, or $81,000. The penal bond in the sum of $20,000, as agreed upon, was executed and approved by the court, and a conveyance was thereupon made by the trustee to Mead of the said property, free and clear of said $300,000 mortgage bonds.

The bond in question runs to Frederick Bausman, as trustee in bankruptcy of the Alaska Smelting Company, and after reciting the order authorizing the sale of the smelter, as aforesaid, and the bid of Mead and the acceptance thereof, concludes with the condition that -

bond should be held for the common benefit of every legal creditor of the bankrupt.

Upon that statement and upon the entry of an order providing for the sale of the assets, Gould stated that he would advise the giving of the bond conditioned to meet the claim of any lawful creditor, if that creditor should prove his equality or priority to Kaad's claim. Accordingly an order of sale of said property was entered on March 21, 1908, directing the sale of the property, providing that the bidder whose bid should be accepted should pay all of the remainder of his bid above $6,000 either in cash or in mortgage bonds at 33-1/3 per cent of their face value, and that if the successful bidder should tender such mortgage bonds in payment of the balance of the bid, in lieu of such cash, and his bid should be accepted, he should furnish security for the payment of creditors in the sum of $20,000.

On April 7, 1908, the bid of Kaad, for said property, of $87,000, payable $6,000 in cash and the balance by the surrender of mortgage bonds of the face value of $243,000 was accepted, said bonds being received on part of said purchase price on the basis of 33-1/3 per cent of their face value, or $81,000. The penal bond in the sum of $20,000, as agreed upon, was executed and approved by the court, and a conveyance was thereupon made by the trustee to Kaad of the said property, free and clear of said $300,000 mortgage bonds.

The bond in question runs to Broderick Hanscom, as trustee in bankruptcy of the Alaska Gold Mining Company, and after recitING the order authorizing the sale of the assets, as aforesaid, and the bid of Kaad and the acceptance thereof, concludes with the condition that -

"if the above bounden Mead shall pay, or cause to be paid, to any persons, firms or corporations that are now or hereafter shall become legal creditors of the bankrupt, Alaska Smelting Company, whatever pro rata sum may be adjudged to be due to them out of the proceeds of the sale of the bankrupt's smelter, to the same extent and with the same punctuality that the same would have been paid as a dividend to them or otherwise, by order of the court, out of the fund in court, had the purchase price been paid in cash, instead of in mortgage bonds (provided, however, that all persons who may hereafter seek to avail themselves, or cause the trustee to avail himself on their behalf, of any liability in their favor or that of the trustee by reason of this obligation, shall cause to be instituted in cause number 3547 the question of any equality or priority upon their part over or with the mortgage bonds aforesaid as creditors of the bankrupt, on or before the 21st day of January, 1909), this obligation shall be null and void; otherwise to remain in full force and effect."

The breach of said obligation assigned in the declaration was that one Hamilton Borden was a person who was a legal creditor of the said bankrupt, and that he caused to be instituted in cause No. 3547 the question of equality and priority on his part, over or with the mortgage bonds in said writing mentioned, as a creditor of said bankrupt, and that thereafter, on January 3, 1910, it was determined and adjudged that he was the owner and holder of seven coupon bonds of the same series as that mentioned in said writing and secured by the same mortgage; that on January 20, 1909, Borden filed his petition, together with his proof of debt on said bonds, seeking to avail himself, and seeking to cause the trustee to avail himself on behalf of said Borden, of the liability in favor of said Borden by reason of said writing obligatory, and instituted in said cause the question of equality on the part of said Borden with the $243,000 mortgage bonds surrendered by said Mead to the trustee aforesaid, and that a copy of said order duly certified by the clerk of said court was sent by mail by said clerk to said trustee and to the attorney for John A. Mead, and to Mead personally, and to said Carl B.

"If the above bonded land shall pay, or cause to be paid, to any person, firm or corporation that are now or hereafter shall become legal creditors of the bankrupt, single existing company, however pro rata may be adjudged to be due to them out of the proceeds of the sale of the bankrupt's creditor, to the same extent and with the same preferability that the same could have been paid as a dividend to them or otherwise, by order of the court, out of the fund in court, had the purchase price been paid in cash, instead of in exchange bonds (provided, however, that if creditor the may nevertheless seek to avail themselves, or cause an creditor to avail himself on their behalf, of any liability in their favor or that of the bankrupt by reason of this obligation, shall cease to be interested in cause under "Act" the question of any equality of priority upon their part over or with the corporate cause affected on creditors of the bankrupt, or of before the date of bankruptcy 1900), this obligation shall be null and void; provided to remain in full force and effect."

The breach of said obligation mentioned in the declaration was that one [illegible] a person who was a legal creditor of the said bankrupt, and that he caused to be instituted in cause [illegible] the question of equality of priority on his part, [illegible] in said writing mentioned, [illegible] and that thereafter, on [illegible] judged that he was [illegible] of the same being [illegible] and declared by the same [illegible] filed his petition, [illegible] bonds, seeking to avail himself [illegible] trustee to avail himself [illegible] bility in favor of [illegible] liquidity, and instituted to [illegible] by on the part of said [illegible] surrendered by said [illegible] copy of said order duly certified by [illegible] sent by said [illegible] for [illegible] and [illegible]

Hinsman, and that it was by said court on January 3, 1910, determined that Borden was a creditor of said bankrupt in the sum evidenced by seven coupon bonds of $1,000 each, dated October 1, 1903, with interest at six per cent per annum, and was, as such creditor, of the same rank as said Mead, and that said Borden was entitled to receive his pro rata share of the purchase price of said property to the same extent and with the same punctuality as if said purchase price of $87,000 had been paid in cash, and that said Borden has not received his pro rata share of said purchase price of said property, or any portion thereof, or any other sum or sums, as dividends, or otherwise, in said cause.

The same averments are made with respect to William J. Selleck, with a like finding that he was the owner and holder of ten coupon bonds of $1,000 each, and that he also was entitled to receive his pro rata share of the purchase price of said property, and that he had not received such share.

The action is in the name of Bausman, as trustee, for the sole benefit of Borden and Selleck, none of the other bondholders and no unsecured creditors appearing to claim any rights under said bond.

The defendant, Hinsman, only was served, who filed pleas to the declaration, setting up, first, that prior to the commencement of this suit the estate of said bankrupt was settled and plaintiff discharged as such trustee. This plea was denied by plaintiff by replication, and issue was joined thereon. A second plea averred that said Borden and Selleck were not at the time said bond was executed, and did not thereafter at any time prior to the commencement of this suit become legal creditors of said bankrupt, and issue was joined on this plea.

Hinsman, and that it was by said court on January 5, 1910, determined that Borden was a creditor of said bankrupt in the sum evidenced by seven coupon bonds of $1,000 each, dated October 1, 1903, with interest at 4½ per cent per annum, and was, as such creditor, of the same rank as said Mead, and that said Borden was entitled to receive his pro rata share of the purchase price of said property to the same extent and with the same punctuality as if said purchase price of $87,000 had been paid in cash, and that said Borden has not received his pro rata share of said purchase price of said property, or any portion thereof, or any other sum or sums, as dividends, or otherwise, in said cause.

The same averments are made with respect to William J. Gallocer, with a like finding that he was the owner and holder of ten coupon bonds of $1,000 each, and that he also was entitled to receive his pro rata share of the purchase price of said property, and that he had not received such share.

The action is in the nature of replevin, as stated, for the sole benefit of Borden and Gallocer, as the sole bondholders and no unsecured creditors appearing to claim any rights under said sale.

The defendant, Hinsman, only was served, who filed pleas to the declaration, setting up, first, that prior to the commencement of this suit the assets of said bankrupt was settled and finally discharged as such trustee. This plea was denied by plaintiff by replication, and issue was joined thereon. A second plea averred that said Borden and Gallocer were not at the time said suit was brought, and did not thereafter at any time prior to the commencement of this suit become legal creditors of said bankrupt, and issue was joined on this

The evidence introduced by the plaintiff consisted of an exemplified copy of the bond sued on, and exemplified copies of two orders of the United States District Court of Washington in re Alaska Smelting Company, bankrupt, entered upon the petitions of said Borden and Selleck, respectively, purporting to find that said Borden and Selleck were holders and owners, one of seven and the other of ten bonds of $1,000 each of said bankrupt, part of the aforesaid total issue of $300,000. Said orders, after reciting the sale to Mead and the transfer to him of the property of the bankrupt, further found that said Borden and Selleck have been creditors of the bankrupt and are entitled to receive their pro rata share of the purchase price of said property to the same extent and with the same punctuality as if said purchase price of $87,000 had been paid wholly in cash, instead of $81,000 thereof having been paid in mortgage bonds.

Neither Mead nor Minsman appeared or took any part in the proceeding in which these orders were entered.

Additional evidence adduced upon the second trial was in part as follows: exemplified copies of the petitions of Selleck and Borden, respectively, concerning their mortgage bonds; one of each of said mortgage bonds held by Selleck and Borden, respectively, showing on their face that the same were part of the same issue of bonds as those surrendered by Mead in part payment of his bid for the smelter; the order of the United States District Court of Washington authorizing the sale by the trustee of the smelter and prescribing the terms and conditions thereof; the bond upon which this action is based; Mead's bid for the smelter and an order accepting the same and confirming the sale, and a deed of conveyance from the trustee to Mead; also depositions tending to

The evidence introduced by the plaintiff consisted of an exemplified copy of the bond sued on, and exemplified copies of two orders of the United States District Court of Washington in re Alaska Smelting Company, bankrupt, entered upon the petitions of said Borden and Sellock, respectively, purporting to find that said Borden and Sellock were holders and owners, one of seven and the other of ten bonds of $1,000 each of said bankrupt, part of the aforesaid total issue of $800,000. Said orders, after vesting the sale to Mead and the transfer to him of the property of the bankrupt, further found that said Borden and Sellock have been creditors of the bankrupt and are entitled to receive their pro rata share of the purchase price of said property to the same extent and with the same punctuality as if said purchase price of $87,000 had been paid wholly in cash, instead of $81,000 thereof having been paid in mortgage bonds.

Neither Mead nor Hinmen appeared or took any part in the proceeding in which these orders were entered.

Additional evidence adduced upon the second trial was in part as follows: exemplified copies of the petitions of Sellock and Borden, respectively, concerning their mortgage bonds; one of each of said mortgage bonds held by Sellock and Borden, respectively, showing on their face that the same were part of the same issue of bonds as those surrendered by Mead in part payment of his bid for the master; the order of the United States District Court of Washington authorizing the sale by the trustee of the master and prescribing the terms and conditions thereof; the bond upon which this action is based; Mead's bid for the master and an order accepting the same and confirming the sale, and a deed of conveyance from the trustee to Mead; also depositions tending to

show that no other bondholders than Mr. Borden, Mr. Selleck and Mr. Mead petitioned for an adjudication of their bonds within the time allowed by the terms of the indemnity bond given by Mead, and that no other than these three sought to file any claims of any kind in the United States District Court in said cause. There is no evidence of any order of the bankruptcy court fixing a rate of distribution of the proceeds of sale, although in the prior opinion of this court it was held that the rate of distribution should be fixed by a proper adjudication in the bankruptcy court.

However, we shall not discuss the controverted question concerning the sufficiency of the evidence presented upon the second trial to cure the omission found in the former opinion, for the reason that a more substantial and fundamental consideration leads us to conclude that the plaintiff or plaintiffs have no right of action upon the bond in question. This conclusion is based upon our construction of the bond, apart from any parol testimony, a construction which in the opinion of the writer of the former opinion should have controlled the judgment upon that appeal.

We hold that this Mead bond was not given for the protection of creditors of the same class as Mead, that is, the holders of mortgage bonds. Giving the bond an interpretation consonant with the circumstances and consistent with its language, it means that Mead was obligated thereby to pay whatever pro rata sum might be adjudicated due creditors, not holding mortgage bonds, who should, prior to January 21, 1909, in case No. 3547, successfully challenge the priority or equality of creditors holding mortgage bonds. The mortgage bonds were a first lien upon the property, and they were all

show that no other bondholders than Mr. Morden, Mr. Sellock and Mr. Mead petitioned for an adjudication of their bonds within the time allowed by the terms of the indemnity bond given by Mead, and that no other than these three sought to file any claims of any kind in the United States District Court in said cause. There is no evidence of any order of the bankruptcy court fixing a rate of distribution of the proceeds of sale, although in the prior opinion of this court it was held that the rate of distribution should be fixed by a proper adjudication in the bankruptcy court.

However, we shall not discuss the controverted question concerning the sufficiency of the evidence presented upon the second trial to cure the omission found in the former opinion, for the reason that a more substantial and fundamental consideration leads us to conclude that the plaintiff or plaintiffs have no right of action upon the bond in question. This conclusion is based upon our construction of the bond, apart from any parol testimony, a construction which in the opinion of the writer of the former opinion should have controlled the judgment upon that appeal.

We hold that this bond bond was not given for the protection of creditors of the same class as Mead, that is, the holders of mortgage bonds. Giving the bond an interpretation consonant with the circumstances and consistent with its language, it means that Mead was obligated thereby to pay whatever pro rata sum might be adjudicated due creditors not holding mortgage bonds. We should, prior to January 1, 1909, in case No. 3347, successfully challenge the priority or equality of creditors holding mortgage bonds. The mortgage bonds were a first lien upon the property, and they were all

upon the same plane of equality. Any proceeding to give any set or holdings of these bonds priority over any others would be useless, and any suggestion to this end would be senseless. The provisions of the Mead bond contemplating an adjudication of the priority of liens cannot refer to any liens about which there was no question, and must refer to that which might be in question, namely, the order of liens, on the one hand, of all creditors holding mortgage bonds, as against, on the other hand, the order of liens of other creditors. It follows, therefore, that Borden and Selleck, as holders of mortgage bonds, are not within the class of persons entitled to be benefited by the Mead bond, and hence have no right of action thereon.

In this view of the case it is unnecessary to discuss other points presented by counsel; our construction of the bond disposes of all other questions in controversy.

For the reasons above indicated the judgment is reversed and judgment of nil capiat is entered in this court.

REVERSED AND JUDGMENT HERE.

upon the same plane of equality. Any proceeding to give any set or holdings of these bonds priority over any others would be useless, and any suggestion to this end would be senseless. The provisions of the land bond contemplating an adjudication of the priority of liens cannot refer to any liens about which there was no question, and must refer to that which might be in question, namely, the order of liens, on the one hand, of all creditors holding mortgage bonds, as against, on the other hand, the order of liens of other creditors. It follows, therefore, that Norden and Lofleck, as holders of mortgage bonds, are not within the class of persons entitled to be benefited by the land bond, and hence have no right of action thereon.

In this view of the case it is unnecessary to discuss other points presented by counsel; our construction of the bond disposes of all other questions in controversy.

For the reasons above indicated the judgment is reversed and judgment of nil capiat is entered in this court.

REVERSED AND JUDGMENT NIL.

216 - 22644

NATHAN WOLF and MORRIS CHOYNSKI,
Appellees,

vs.

THE SELIG POLYSCOPE CO., a corporation, GEORGE KLEINE, ESSANAY FILM MANUFACTURING CO., a corp.,
Appellants.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

204 I.A. 178

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By this appeal the defendants seek the reversal of a judgment against them in the sum of $2,000 had by plaintiffs in an action on the case charging conspiracy to injure the business of plaintiffs, with resulting damages.

The evidence shows that the defendants are motion picture film manufacturers or producers; that motion picture producers in the United States generally print and distribute in connection with their business what is known as a "poster," which is a colored lithograph of scenes from the films; these posters are sold to the motion picture theatre proprietors exhibiting the pictures in their theatres and who exhibit the posters in front of their theatres as a kind of advertisement to attract patrons.

It is shown that the plaintiffs had for a number of years been engaged in the exhibition business and also the business of buying and selling the motion picture posters. An association of the theatre proprietors was formed, of which plaintiffs were members. This association became dissatisfied with the way the motion picture posters were being sold and distributed by the manufacturers, and plaintiffs desired to enter into this business of buying and selling posters for the purpose of giving the association of exhibitors

NATHAN WOLF and ADOLPHE GROSSMAN,
Appellees,

vs.

THE MUTUAL FILM CORPORATION, a corporation, GEORGE KLEINE, MONARCH FILM MANUFACTURING CO., a corp.,
Appellants.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE McSURLY

DELIVERED THE OPINION OF THE COURT.

By this appeal the defendants seek the reversal of a judgment against them in the sum of $4,000 had by plaintiffs in an action on the case charging conspiracy to injure the business of plaintiffs, also resulting damages.

The evidence shows that the defendants are motion picture film manufacturers or producers; that motion picture producers in the United States generally print and distribute in connection with their business what is known as a "poster," which is a colored lithograph of scenes from the film; these posters are sold to the motion picture theatre proprietors exhibiting the pictures in their theatres and who exhibit the posters in front of their theatres as a kind of advertisement to attract patrons.

It is shown that the plaintiffs had for a number of years been engaged in the exhibition business and also the business of buying and selling the motion picture posters.

An association of the theatre proprietors was formed, of which plaintiffs were members. This association became dissatisfied with the way the motion picture posters were being sold and distributed by the manufacturers, and plaintiffs desired to enter into this business of buying and selling posters for the purpose of giving the association of theatres

better service. Some time in November, 1912, the plaintiffs called upon a Mr. Day, connected with the defendant Essanay Film Company; plaintiffs had been in various moving picture dealings with Mr. Day prior to that time. Plaintiffs stated that they wanted to get a price on posters, and were informed by Mr. Day that he could supply them with posters and that plaintiffs might put in an order for same. Plaintiffs then called at the office of the defendant Kleine, and there talked to a Mr. McCarahan, who offered to sell them posters at eight cents each. They then went to the defendant Selig's place of business and told Mr. Selig that they wanted to see about posters, and were told that they probably could be supplied. Plaintiffs say that they then went to an office and installed some furniture, and then made a second trip around to each of the defendants and ordered posters, but that defendants without any explanation refused to deliver them.

Plaintiffs testified that on this second interview each of the defendants informed them that they could only secure posters in the event that the other two defendants would supply plaintiffs with posters. There is also evidence tending to show that plaintiffs could not procure these posters at a wholesale price from any other persons except the defendants.

The testimony of plaintiffs in essential particulars is denied by the defendants. Mr. Day of the Essanay Company testified that the plaintiffs did not order any lithographs at any time; that he did not refuse to sell them, but told them that his company was not engaged in the business of retailing posters, but that they could get all they wished from a Mr. Van Ronkle who exclusively sold Essanay posters in Chicago, and that he never told them that the

better service. Some time in November, 1912, the plaintiffs called upon a Mr. Day, connected with the defendant Kenney Film Company; plaintiffs had been in various moving picture dealings with Mr. Day prior to that time. Plaintiffs stated that they wanted to get a price on posters, and were informed by Mr. Day that he could supply them with posters and that plaintiffs might put in an order for same. Plaintiffs then called at the office of the defendant Fleing, and there talked to a Mr. McCarthen, who offered to sell them posters at eight cents each. They then went to the defendant Ellig's place of business and told Mr. Ellig that they wanted to see about posters, and were told that they probably could be supplied. Plaintiffs say that they then went to an office and installed some furniture, and then made a second trip around to each of the defendants and ordered posters, but that defendants without any explanation refused to deliver them.

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Essanay Company would not sell posters because the other two defendants would not sell them, and that nothing of the kind was ever mentioned.

It seems to be undisputed that plaintiffs knew that all the posters manufactured by the defendants were sold in Chicago by Mr. Van Ronkle. One of the plaintiffs had at one time been engaged in business with Van Ronkle, and testified that he usually got all the posters he wanted from him. Van Ronkle also testified that he knew both plaintiffs for a number of years, that Wolf had been associated with him, and that plaintiffs had bought posters of the defendants from him, as he had all of them for sale and never refused to sell posters to any one. Selig says that plaintiffs called on him and that he told them he thought he could supply their demand; that on their second visit they talked again about buying posters and he requested that they submit a written order as to what they wanted; that afterwards, in the latter part of December, they wrote a letter to which the defendant Selig replied inviting plaintiffs to submit a proposition informing him just what they were going to do with the posters and how many they wanted, and that if this was satisfactory the defendant Selig would be pleased to do business with them; that no reply was made by plaintiffs to this letter.

Mr. McCarahan, acting for the defendant Kleine, says that plaintiffs came to his office saying that they represented the motion pictures exhibitors league, who were dissatisfied with the way the poster business was being run in Chicago, and that plaintiffs wanted to engage in that business; that they inquired in general about the number of posters Kleine had on hand and could supply, but that nothing definite was said as to any orders; that he never told them

[illegible] Company would not sell posters because the other two defendants would not sell them, and that nothing of the kind was ever mentioned.

It seems to be undisputed that plaintiffs knew that all the posters manufactured by the defendants were sold in Chicago by Mr. Van Donkle. One of the plaintiffs had at one time been engaged in business with Mr. Donkle, and testified that he usually got all the posters he wanted from him. Van Donkle also testified that he knew both plaintiffs for a number of years, that will had been associated with him and that plaintiffs had bought posters of the defendants from him, as he had all of them for sale in, never refused to sell posters to any one. Being sure that plaintiffs called on him and that he will then be thought to could supply their demand; that on their second visit they talked much about buying posters and he remembered that they showed a written order as to what they wanted; that [illegible], in the latter part of December, they wrote a letter to [illegible] the defendant saying required letting plaintiffs to submit a [illegible] showing him just what they were [illegible] in [illegible] many they wanted, and that [illegible] defendant [illegible] that no reply was made by plaintiffs to [illegible].

Mr. Mc Cormick, counsel for the defendant [illegible], made that plaintiffs [illegible] office [illegible] reached the motion pictures [illegible] satisfied with the way the other defendants [illegible] in Chicago, and that plaintiffs wanted to [illegible] money; that they inquired in personal about the [illegible] are [illegible] had [illegible] on 14 August, [illegible] defendants [illegible] to [illegible]; [illegible] had [illegible]

that Kleine would not sell them posters. There was no evidence that there was any conversation or talk between the defendants showing any agreement between them not to sell posters to the plaintiffs.

The gist of this action is a joint conspiracy to violate the contracts entered into severally by the defendants with the plaintiffs. It therefore was essential to plaintiff's case that they establish the several contracts with the defendants. We are of the opinion that they have failed in this respect. Taking their own statements in the most favorable light to them, there has been shown nothing more than preliminary negotiations which might or might not ultimately have resulted in contracts. At most what was said by the defendants merely amounted to an offer that if plaintiffs should wish to purchase posters and should make a proposition which was satisfactory to the defendants they might do business together. In the case of the Essanay plaintiffs were told that this company was not engaged in the business of retailing posters and were referred to Van Ronkle who handled all the posters made by that defendant. In not a single instance can it be said that the conversations between the plaintiffs and the defendants respectively amounted to a contract. A contract to be enforcible must be definite as to amount, the price, terms of payment and time of delivery. These elements are not determined by the loose, informal talk of the parties.

Plaintiffs having failed to prove the contracts which it is alleged defendants conspired to break, their case fails, and the judgment will be reversed with a finding of facts and judgment of nil capiat will be entered in this court.

REVERSED WITH FINDING OF FACTS.

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Plaintiffs having failed to prove the contracts which it is alleged defendants conspired to break, their case fails, and the judgment will be reversed with a finding of facts and judgment of nil capiat will be entered in this court.

REVERSED. (FR WINDING OF FACTS.

216 - 22644

FINDING OF FACTS.

The court finds that no contracts were entered into between the plaintiffs and the defendants, respectively, which defendants conspired to break, as alleged in plaintiffs' declaration.

FINDING OF FACTS.

The court finds that no contracts were entered into between the plaintiffs and the defendants, respectively, which defendants conspired to break, as alleged in plaintiffs' declaration.

226 - 22657.

204 I.A. 179

ELLEN BARRETT, Admx. Estate of Thomas E. Barrett, Deceased, Plaintiff in Error,	) Error to
vs.	) County Court,
ANNIE MARSCHAK, Admx. Estate of Joseph Marschak, Deceased, Defendant in Error.	) Cook County.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By this writ of error is brought in review the record in an action upon a replevin bond in which judgment was entered against the plaintiff. Phases of this case have been before this court several times. See 154 Ill. App. 637; 171 App. 601, and 192 App. 481. Upon the appeal where the opinion appears in the last citation, Mr. Presiding Justice Baume in an extended opinion narrated all the important facts, and we shall not repeat these. By that opinion it appears that because of improper rulings on the competency of evidence the judgment was reversed and the cause remanded. After the cause was remanded to the County Court the defendant filed a plea, called an amended 4th plea, all the other pleas having previously been withdrawn, setting up as a bar to the proceeding a judgment in the Municipal Court adverse to the plaintiff in that case, who was Strassheim, the successor to Sheriff Barrett, which was affirmed by the Appellate Court, volume 171, supra. Plaintiff filed replications to this plea, the first of which set up the fact that Strassheim had no title and had no right of action, and that the plaintiff, Ellen Barrett, administratrix, was not a party to that suit and therefore ought not to be bound thereby. To this replication

No. - Error.

ELLEN BARNETT, Adm. Estate of Thomas H. Barnett, Deceased, Plaintiff in Error,	Error to
vs.	County Court,
ANNIE MARSCHAK, Adm. Estate of Joseph Marschak, Deceased, Defendant in Error.	Cook County.

MR. PRESIDING JUSTICE MORRISSEY
DELIVERED THE OPINION OF THE COURT.

By this writ of error is brought in review the record in an action upon a replevin bond in which judgment was entered against the plaintiff. Phases of this case have been before this court several times. See 164 Ill. App. 627; 171 App. 601, and 192 App. 461. Upon the appeal where the opinion appears in the last citation, Mr. Presiding Justice Baume in an extended opinion narrated all the important facts, and we shall not repeat them. By that opinion it appears that because of improper rulings on the competency of evidence the judgment was reversed and the cause remanded. After the cause was remanded to the County Court the defendant filed a plea, called an amended 4th plea, all the other pleas having previously been withdrawn, setting up as a bar to the proceeding a judgment in the municipal court against the plaintiff in that case, who was Abrahamson, the successor to Morris Barnett, which was affirmed by the Appellate Court, volume 171, supra. Plaintiff filed replications to this plea, the first of which set up the fact that Abrahamson had no title and had no right of action, and that the plaintiff, Ellen Barnett, administratrix, was not a party to that suit and therefore ought not to be bound thereby. To this replication

a demurrer was filed. Plaintiff moved that the demurrer be carried back to the plea and sustained, which motion was denied.

We are of the opinion that the court was in error in so ruling. In the opinion in this case by Mr. Justice Baume the effect of this prior proceeding and judgment was passed upon, the court saying: "The right of action upon the replevin bond in question given to Thomas E. Barrett, Sheriff of Cook County, was on the death of said Thomas E. Barrett, vested in his administratrix and not in his successor, Christopher Strassheim. Schott v. Youres, 142 Ill. 233." And further, after discussion of the proposition as to whether or not the judgment in the Strassheim suit was an adjudication in the instant suit, the court concludes that "said judgment would not operate to bar the present suit." This settles the law of this case, and even if we were not in accord with the conclusion therein reached we would be bound to follow it, and the trial court was in error in not doing so. We might also add that we are in thorough accord with the conclusion stated in Judge Baume's opinion. In this situation the trial court should have held that the plea of res judicata was ineffective and demurrable.

We think there is no merit in the contention that when the court sustained the demurrer to the replication and plaintiff went to trial on the issues made by the other replications there was a waiver of the effect of the order of the court denying the motion to carry the demurrer back to the plea. We are cited to no cases so holding, and can see no reason why this should be the rule. The effect where the motion to carry

a demurrer was filed. Plaintiff moved that the demurrer be quashed back to the plea and sustained, which motion was denied.

We are of the opinion that the court was in error in so ruling. In the opinion in this case by Mr. Justice Sanders the effect of this prior proceeding and judgment was passed upon, the court saying: "The right of action upon the replevin bond in question given to Thomas W. Barrett, Sheriff of Cook County, was on the death of said Thomas J. Barrett, vested in his administrator and not in his successor, Christopher Strassheim. Roberts v. Thomas, 148 Ill. 224." and further, after discussion of the proposition as to whether or not the judgment in the Strassheim suit was an adjudication in the instant suit, the court concludes that "said judgment would not operate to bar the present suit." This motion the law of this case, and even if we were not in accord with the conclusion therein reached we would be bound to follow it, and the trial court was in error in not doing so. We might also add that we are in thorough accord with the conclusion reached in Judge Sanders's opinion. In fact, in the opinion the point should have been that the plea of res judicata is wholly inadmissible and demurrable.

We think there is no merit in the contention that when the court sustained the demurrer to the replevin and injunction suit and in which on the issues made by the other pleadings there was a waiver of the effect of the demurrer, in not sustaining the motion to carry the demurrer back to the plea, [illegible] be not called to no cause in that suit, [illegible] which should be the rule. [illegible] to carry

a demurrer to a replication back to a plea is overruled and the parties proceed to trial, is stated in Bennett v. Union Central Life Ins. Co., 203 Ill. 439, which holds that where a demurrer to a plea is sustained and the pleader does not ask leave to amend his plea he will be held to abide by or "stand by" his plea, and may be heard to urge in a court of review that his plea was good in law and that it was error to hold it insufficient on demurrer.

For the reason that the trial court was in error in not following the law of the case as fixed in the prior decision of this court, the judgment is reversed and the cause is remanded to the County Court with directions to overrule the demurrer to the first replication and to carry said demurrer back to the 4th amended plea and sustain the demurrer to said plea.

REVERSED AND REMANDED
WITH DIRECTIONS.

a demurrer to a replication back to a plea is overruled and the parties proceed to trial, it stated in Bennett v. Union Central Life Ins. Co., 202 Ill. 459, which holds that where a demurrer to a plea is sustained and the pleader does not ask leave to amend his plea he will be held to abide by or "stand by" his plea, and may be forced to urge in a court of review that his plea was good in law and that it was error to hold it insufficient on demurrer.

For the reason that the trial court was in error in not following the law of the case as fixed in the prior decision of this court, the judgment is reversed and the cause is remanded to the County Court with directions to overrule the demurrer to the first replication and to enter said demurrer back to the 4th amended plea and sustain the demurrer to said plea.

REVERSED AND REMANDED
WITH DIRECTIONS.

232 - 23665

CHICAGO SAVINGS BANK & TRUST COMPANY and LUCIUS TETER, Plaintiffs in Error,

vs.

MARY J. DUNN and WILLIAM H. DUNN, Defendants in Error.

ERROR TO CIRCUIT COURT, COOK COUNTY.

204 I.A. 181

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error petitioned in a foreclosure proceeding for a writ of assistance, but this was denied as to defendant in error Mary J. Dunn. The propriety of this order is challenged by this writ of error.

The Chicago Savings Bank & Trust Company on October 30, 1913, filed a bill to foreclose a purchase money mortgage given by Lyda Champlin to secure $2,500 of the purchase money for real estate bought from Teter for $2,900, the deed to her being recorded on June 27, 1913. Lyda Champlin conveyed the premises to William H. Dunn by deed dated July 5, 1913, and thereupon William H. Dunn moved onto the premises and has resided there with his family continuously since that date. The bill to foreclose made Lyda Champlin a party defendant, and also William H. Dunn, but did not make his wife, Mary J. Dunn, a defendant. The foreclosure proceedings went to a decree of sale, and on July 3, 1914, the premises were sold to Lucius Teter, who received a deed therefor upon the expiration of the period of redemption. The decree provided for letting the purchaser into possession and that a writ of assistance should issue. Afterwards demand for possession was made upon both

238 - 23265

CHICAGO SAVINGS BANK & TRUST COMPANY and LUCIUS TETER,
Plaintiffs in Error,

vs.

MARY L. DUNN and WILLIAM H. DUNN,
Defendants in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE MORRISSY
DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error petitioned in a foreclosure proceeding for a writ of assistance, but this was denied as to defendant in error Mary L. Dunn. The propriety of this order is challenged by this writ of error.

The Chicago Savings Bank & Trust Company on October 30, 1913, filed a bill to foreclose a purchase money mortgage given by Lyda Champlin to secure $2,800 of the purchase money for real estate bought from Peter for $3,900, the deed to her being recorded on June 27, 1913. Lyda Champlin conveyed the premises to William H. Dunn by deed dated July 5, 1913, and thereupon William H. Dunn moved onto the premises and has resided there with his family continuously since that date. The bill to foreclose made Lyda Champlin a party defendant, and also William H. Dunn, but did not make his wife, Mary L. Dunn, a defendant. The foreclosure proceedings went to a decree of sale, and on July 3, 1914, the premises were sold to Lucius Teter, who received a deed therefor upon the expiration of the period of redemption. The decree provided for letting the purchaser into possession and that a writ of assistance should issue. Afterwards demand for possession was made upon both

William H. Dunn and Mary J. Dunn, an earlier demand on William H. Dunn alone having been refused as he claimed that his wife, Mary J. Dunn, was the owner of the premises. Between the date of the service of this demand and notice and the date designated in such notice for the presentation of petition for a writ of assistance to the court, two deeds were filed for record on March 20, 1916, one from Lyda Champlin to William H. Dunn, and the other from William H. Dunn to Mary J. Dunn, dated July 8, 1913. Upon these matters being presented by petition, the court was apparently of the opinion that the writ of assistance should not issue against Mary J. Dunn for the reason that she had not been made a party defendant in the foreclosure proceeding, and that being in possession she was a necessary and indispensable party.

In so holding the court was in error. Dower cannot be asserted against a purchase money mortgage; the wife of the owner of the equity of redemption is neither a necessary nor a proper party to proceedings to foreclose a mortgage of that kind. In Baker v. Scott, 62 Ill. 86, it was held under similar circumstances that not only was the wife an improper party in a foreclosure bill but that a demurrer on this ground should have been sustained. Among many other cases announcing the same rule are Short v. Haub, 81 Ill. 509; Lohmeyer v. Durbin, 206 Ill. 574; Harrow v. Grogan, 219 Ill. 288; Stephens v. Bicknell, 27 Ill. 444.

Neither can it be said that Mary J. Dunn had a homestead in the property and should have been made a party. She did not have the homestead, as this was vested solely in the husband during his lifetime and while he continuously resided with his family. While the wife has the right of occupancy with the children, yet during the lifetime of the

William H. Dunn and Mary J. Dunn, an earlier demand on William H. Dunn alone having been refused on he claimed that his wife, Mary J. Dunn, was the owner of the premises. Between the date of the service of this demand and notice and the date designated in such notice for the presentation of petition for a writ of assistance to the court, two deeds were filed for record on March 20, 1918, one from Lyda Champlin to William H. Dunn, and the other from William H. Dunn to Mary J. Dunn, dated July 6, 1913. Upon these matters being presented by petition, the court was apparently of the opinion that the writ of assistance should not issue against Mary J. Dunn for the reason that she had not been made a party defendant in the foreclosure proceeding, and that being in possession she was a necessary and indispensable party.

In so holding the court was in error. Power cannot be asserted against a purchaser money voluntary; his wife or the owner of the equity of redemption is neither a necessary nor a proper party to proceedings to foreclose a mortgage of that kind. In Baker v. Scott, 62 Ill. 86, it was held under similar circumstances that not only was the wife an improper party in a foreclosure bill but if a demurrer on this ground should have been sustained. Many other cases announcing the same rule are Mayer v. Kuhn, 11 Ill. App. 1; Lowman v. Martin, 206 Ill. 274; Hancock v. Groves, 216 Ill. 86; Stephens v. Nickerson, 7 Ill. App.

Neither can it be [illegible] v. Kelly J. [illegible] homestead in the property and should have been made a party. She did not have the homestead, as [illegible] voluntary in the husband during his lifetime and while he continuously resided with his family. While the wife has the rights of occupancy with the minors, yet during the lifetime of the

husband and during the time he continues to reside with them, her rights are merely contingent, somewhat like the inchoate right of dower. Taylor v. Taylor, 223 Ill. 423.

Even if Mary J. Dunn had an estate of homestead this could not be asserted against a purchase money mortgage. Stafford v. Woods, 144 Ill. 203.

We are also inclined to agree with the contention that the deed from William H. Dunn to his wife, Mary, conveyed nothing. It is admitted that the property was of the value of $2,900; the purchase money mortgage being for $2,500 left an equity of $400. That brings it precisely within the rule stated in Roberson v. Tippie, 209 Ill. 38, where it was held that "a conveyance of the homestead not exceeding in value $1,000 by a householder to his wife, she not joining therein and acknowledging the same as required by the statute, is absolutely void and passes no title whatever."

Plaintiffs in error were clearly entitled to the writ of assistance against Mary J. Dunn, and the order of the Circuit Court denying this is reversed and the cause is remanded with directions to issue a writ of assistance against Mary J. Dunn as well as against William H. Dunn.

REVERSED AND REMANDED WITH DIRECTIONS.

husband and during the time he continues to reside with them, her rights are merely contingent, somewhat like the inchoate right of dower. Jackson v. Taylor, 221 Ill. 489.

Even if Mary G. Hunt had an estate of homestead this could not be asserted again a purchase money mortgage. Stafford v. Hoch, 144 Ill. 303.

We are also confined to every with the conclusion that the deed from William C. Hunt to his wife, Mary, conveyed nothing. It is admitted that the property was of the value of $2,000; the purchase money mortgage being for $1,300 left an equity of $600. That brings it precisely within the rule stated in Robinson v. Jones, 207 Ill. . , where it was held that "a conveyance of an homestead not exceeding in value $1,000 by a husband to his wife, she not joining, therein and acknowledging the same as required by the statute, is absolutely void and passes no title whatever."

Plaintiffs in error are clearly entitled to the writ of restitution against Mary G. Hunt, and the order of the Circuit Court ordering this to be done and the cause is remanded with directions to issue a writ of restitution against Mary G. Hunt. [illegible]

Reversed and remanded [illegible].

81 - 22499

E. J. JOHNSON,
Defendant in Error,

vs.

ADOLPH W. WALDMAN,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

204 I.A. 190

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

E. J. Johnson brought an attachment suit in the Municipal Court of Chicago against the defendant, Adolph W. Waldman. Judgment was entered in that court in favor of the plaintiff, and the defendant brings the case here by writ of error for review.

Rule 18 of the rules of this court requires that in all cases the party bringing the cause into this court shall furnish a complete abstract of the record made in the trial court. What purports to be an abstract of the record filed in this court by the defendant is as follows:

*Rec.
Page
1 Placita.
3 Affidavit for attachment.
5 Attchment bond.
7 Attachment writ.
8 Appearance of Adolph W. Waldman and Mary Waldman.
9 Order for leave to file amended bond.
10 Order extending defendant's time to file traverse.
11 New attachment bond.
13 Order quashing attachment writ and dismissing suit against all defendants, except Adolph W. Waldman.
14 Order for leave to file count in trover.
16 Amended statement of claim.
18 Affidavit of merits.
19 Order dismissing suit for want of prosecution.
20 Order reinstating case.
21 Order continuing case.
22 Finding for plaintiff in trover, and exception.
23 Motion defendant new trial, overruled and exception.
Motion in arrest of judgment, overruled and exception.
Judgment on finding for plaintiff, and exception.
24 Order extending time to file bill of exceptions.
Order approving stay bond.
26 Stay of execution bond.
27 Order approving stenographic report.
28 Stenographic report filed."

F. J. JOHNSON, Defendant in Error,	ERROR TO MUNICIPAL COURT
vs.	OF CHICAGO.
ADOLPH F. WALDMAN, Plaintiff in Error.	

MR. JUSTICE DIVINE DELIVERED THE OPINION OF THE COURT:

F. J. Johnson brought an attachment suit in the Municipal Court of Chicago against the defendant, Adolph F. Waldman. Judgment was entered in that court in favor of the plaintiff, and the defendant brings the case here by writ of error for review.

Rule 18 of the rules of this court requires that in all cases the party bringing the cause into this court shall furnish a complete abstract of the record made in the trial court. What purports to be an abstract of the record filed in this court by the defendant is as follows:

"Page.
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1 Pleadings.
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5 Attachment bond.
7 Attachment writ.
8 Appearance of Adolph F. Waldman and Mary Waldman.
9 Order for leave to file amended bond.
10 Order extending defendant's time to file pleadings.
11 New attachment bond.
13 Order quashing attachment writ and dismissing suit against all defendants, except Adolph F. Waldman.
14 Order for leave to file count in trover.
16 Amended statement of claim.
18 Affidavit of merits.
19 Order dismissing suit for want of prosecution.
20 Order reinstating case.
21 Order continuing case.
22 Finding for plaintiff in trover, and assessation.
23 Motion defendant for trial, overruled and exception.
Motion in arrest of judgment, overruled and exception.
Judgment on finding for plaintiff, and exception.
24 Order extending time to file bill of exceptions.
Order approving new bond.
26 Stay of execution bond.
27 Order approving stenographic report.
28 Stenographic report filed."

This is a mere index and not an abstract of the record.

We are inclined to the view that, in any event, the judgment of the Municipal Court was proper; but even if this were not so, this judgment would have to be affirmed because of the failure of the defendant to comply with the rules of this court in the preparation of the abstract.

AFFIRMED.

This is a mere index and not an abstract of the record.

We are inclined to the view that, in any event, the judgment of the Municipal Court was proper; but even if this were not so, this judgment would have to be affirmed because of the failure of the defendant to comply with the rules of this court in the preparation of the abstract.

AFFIRMED.

86 - 22504

BENJAMIN MOORE & COMPANY,
a corporation,
Plaintiff in Error,

vs.

JOHN W. CLARK,
Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

204 I.A. 101

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is a writ of error to review a judgment of the Municipal Court. The subject matter in this suit was adjudicated in an attachment suit, No. 525520, in the Municipal Court. The plaintiff here was an intervening petitioner in that proceeding, and it obtained a judgment in its favor for the sum of $417.65. The only question presented to this court is whether the abbreviated form of the judgment in the attachment suit is such a valid judgment of the Municipal Court as that it can be said to be res judicata of the rights of the plaintiff in this suit.

The record discloses that title to the subject matter of this suit was an issue in the attachment proceeding in the Municipal Court, in which the plaintiff in error on its own motion intervened; that it obtained a judgment in its favor; that the defendant was in said proceeding ordered to pay plaintiff the sum of $417.65 of moneys then in the possession of the defendant; and that this sum was paid by the defendant to the plaintiff and was accepted by it.

It is held in Hunter v. Empire Surety Co., 191 Ill. App. 634, that an entry of an abbreviated form of judgment was not the formal record of a judgment; that it was, however, a sufficient minute of the proceedings to enable

SENTARIN MOORE & COMPANY,
a corporation,
Plaintiff in Error,

vs.

JOHN W. CLARK,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

204 I.A. 191

MR. JUSTICE MEYER DELIVERED THE OPINION OF THE COURT.

This is a writ of error to review a judgment of the Municipal Court. The subject matter in this suit was adjudicated in an attachment suit, No. 82820, in the Municipal Court. The plaintiff here was an intervening petitioner in that proceeding, and it obtained a judgment in its favor for the sum of $417.65. The only question presented to this court is whether the abbreviated form of the judgment in the attachment suit is such a valid judgment of the Municipal Court as that it can be held to be res judicata of the rights of the plaintiff in this suit.

The record discloses that title to the subject matter of this suit was an issue in the attachment proceeding in the Municipal Court, in which the plaintiff in error on its own motion intervened; that it obtained a judgment in its favor; that the defendant was in said proceeding ordered to pay plaintiff the sum of $417.65 of moneys then in the possession of the defendant; and that this sum was paid by the defendant to the plaintiff and was accepted by it.

It is held in Hunter v. Empire Surety Co., 191 Ill. App. 654, that an entry of an abbreviated form of judgment was not the formal record of a judgment; that it was, however, a sufficient minute of the proceedings to enable

the clerk to properly enter the judgment in the case.

In Abramovitz v. Longknecht, 195 Ill. App. 484, referring to an invalid record of a judgment, the court said, "it is within the right and power of the appellant to have a valid record of the judgment entered. The judgment of the court in that case is not invalid, even though the record of the same, as it now stands, is."

A judgment in an attachment suit which adjudicates the right of all parties properly before the court, either by intervening petition or by valid service of process, is binding upon all such parties, and such adjudication is res judicata of their rights in the subject matter of the suit. The plaintiff has treated this judgment, which it now claims is invalid, as a valid judgment, and it has accepted the sum found due it in the attachment proceedings; it can not in this suit be permitted to say that the judgment in its favor was illegal. Had it been dissatisfied with the judgment of the Municipal Court in the attachment suit it could have prosecuted an appeal or writ of error to this court; by its failure to have done so it must be held to have elected to abide by the judgment in that case.

There is no merit in the claim that the clerk's entry of the judgment in the attachment suit was not in the English language and that it should have been ruled out by the trial judge in this suit. An examination of that part of the entry of the judgment referring to the adjudication of the issue arising under plaintiff's intervening petition reveals that while certain words in the order are abbreviated, still the order is in such form that it is not at all difficult to determine its definite meaning. That part of the

the clerk to properly enter the judgment in this case.

In *Abramovitz* v. *Longmeadow*, 195 Ill. App. 434, referring to an invalid record of a judgment, the court said, "It is within the right and power of the appellant to have a valid record of the judgment entered. The judgment of the court in that case is not invalid, even though the record of the same, as it now stands, is."

A judgment in an attachment suit which adjudicates the right of all parties properly before the court, either by intervening petition or by valid service of process, is binding upon all such parties, and such adjudication is *res judicata* of their rights in the subject matter of the suit. The plaintiff has treated this judgment, which it now claims is invalid, as a valid judgment, and it has accepted the sum found due it in the attachment proceedings; it can not in this suit be permitted to say that the judgment in its favor was illegal. Had it been identified with the judgment of the municipal court in the attachment suit it could have prosecuted an appeal or writ of error to this court; by its failure to have done so it must be held to have elected to abide by the judgment in that case.

There is no merit in the claim that the clerk's entry of the judgment in the attachment suit was not in the English language and that it should not have been read by the trial judge in this suit. An examination of the record of the entry of the judgment referring to the adjudication of the issue making a bona fide claimant's intervening petition provide that after certain words [illegible] under the attachment, still the order [illegible] to be not [illegible] cult to determine its definite meaning. That part of the

order of judgment referred to is as follows;

> "and for interv claim as to four hundred seventeen 65/100 dols ($417.65) of funds in hands of Garn. Judg on fndg on claim of interv claim of Benjamin Moore & Co. partly for plff and partly for interv claim as per finding N. C. Mo."

Plaintiff does not deny that it received of defendant the $417.65 awarded it in the attachment suit. We are of the opinion that the judgment in such suit was and is res judicata of the rights of the plaintiff to the moneys in the possession of the defendant.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

order of judgment referred to is as follows;

"and for injury claim as to four hundred seventeen 65\100 dolls ($417.65) of funds in hands of defn. judg on this on claim of injury claim of Benjamin Moore & Co. partly for plff and partly for injury claim as per finding a. C. Co."

Plaintiff does not deny that it received of defendant the $417.65 awarded it in the attachment suit. We are of the opinion that the judgment in such suit was and is res judicata of the rights of the plaintiff to the moneys in the possession of the defendant.

The judgment of the municipal Court will be affirmed.

AFFIRMED.

89 - 22509

A. M. CHESBROUGH,
Defendant in Error,

vs.

JACOB LANSKI,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

204 I.A. 192

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is a writ of error to the Municipal Court of Chicago to reverse a judgment of that court in favor of plaintiff, A. M. Chesbrough, and against defendant, Jacob Lanski, for the sum of $190.

The controversy arose over a contract, evidenced by certain correspondence between the parties. On August 19, 1915, the plaintiff by letter requested the defendant to quote him a price on scrap iron. On August 21, 1915, in answer to this letter, defendant offered to purchase of plaintiff scrap iron of the kind referred to in plaintiff's letter of August 19th, at $8.00 per gross ton f o b cars Thompson, Mich." On August 23, 1915, plaintiff wrote defendant in part as follows:

> "As soon as we wan get around to it I think we will be able to load out about four carloads. Some of this scrap is old saw mill machinery in quite large pieces. Can these be put in the same as smaller scrap? It would of course have to be broken up before being put to use."

On August 25, 1915, in answer to this defendant wrote, "it will be satisfactory that you ship all the scrap iron you have * * * at the price quoted you of $8.00 per gross ton." On receipt of the letter of August 25th plaintiff shipped one carload, 23 3/4 tons, of scrap iron to the defendant.

On October 8, 1915, defendant wrote plaintiff to "do whatever possible to hurry forward the rest of the

A. M. CHESBROUGH, Defendant in Error,	ERROR TO MUNICIPAL COURT
vs.	OF CHICAGO.
JACOB LANSKI, Plaintiff in Error.	

204 I.A. 192

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is a writ of error to the Municipal Court of Chicago to reverse a judgment of that court in favor of plaintiff, A. M. Chesbrough, and against defendant, Jacob Lanski, for the sum of $100.

The controversy arose over a contract, evidenced by certain correspondence between the parties. On August 12, 1915, the plaintiff by letter requested the defendant to quote him a price on scrap iron. On August 21, 1915, in answer to this letter, defendant offered to purchase of plaintiff scrap iron of the kind referred to in plaintiff's letter of August 12th, at $8.00 per gross ton f o b cars Thompson, Ill." On August 23, 1915, plaintiff wrote defendant in part as follows:

> "As soon as we can get around to it I think we will be able to load out about four carloads. Some of this scrap is old and will machinery in quite large pieces. Can these be put in the same as smaller scrap? It would of course have to be broken up before being put to use."

On August 25, 1915, in answer to this defendant wrote, "It will be satisfactory that you ship all the scrap iron you have * * * at the price quoted you of $8.00 per gross ton." On receipt of the letter of August 25th plaintiff shipped one carload, 45 3/4 tons, of scrap iron to the defendant.

On October 8, 1915, defendant wrote plaintiff to "do whatever possible to hurry forward the rest of the

scrap iron you sold me." Plaintiff by letter dated October 13, 1915, refused to deliver any more material to defendant until the latter had paid for the carload already delivered to him. On October 14, 1915, defendant wrote complaining of the quality of the material sent him by plaintiff; yet, in this letter, and again on October 22, 1915, he offered to pay plaintiff for the scrap iron only in the event that plaintiff would deliver to him all of the scrap iron which plaintiff had in August, 1915.

It is conceded that the defendant has obtained from the plaintiff a carload of scrap iron which he has refused to pay for. One reason assigned by him for this refusal is that the quality of the material delivered was not such as plaintiff was required to deliver to him under the terms of the contract. We do not think there is much merit in this contention. The correspondence between the parties does show that defendant did make some complaint of the quality of the material delivered to him, but notwithstanding that fact he continued to demand of the plaintiff the delivery of two or three carloads more of the same material.

The defendant also insists that he was not required, under the terms of his contract with plaintiff to make payment for any of the material ordered until there had been a delivery to him of all of the material which plaintiff had in his possession. This defense cannot be allowed. The contract was not for any specific quantity of scrap iron; it was indefinite as to the amount that was to be delivered to the defendant, and, in that the contract contained no express provision as to the time of payment, it will be presumed that payment became due as of the date of the delivery of the material.

scrap iron you sold me." Plaintiff by letter dated October 15, 1915, refused to deliver any more material to defendant until the latter had paid for the carload already delivered to him. On October 14, 1915, defendant wrote complaining of the quality of the material sent him by plaintiff; yet, in this letter, and again on October 22, 1915, he offered to pay plaintiff for the scrap iron only in the event that plaintiff would deliver to him all of the scrap iron which plaintiff had in August, 1915.

It is conceded that the defendant has obtained from the plaintiff a carload of scrap iron which he has refused to pay for. One reason assigned by him for this refusal is that the quality of the material delivered was not such as plaintiff was required to deliver to him under the terms of the contract. We do not think there is much merit in this contention. The correspondence between the parties does show that defendant did make some complaint of the quality of the material delivered to him, but notwithstanding that fact he continued to demand of the plaintiff the delivery of two or three carloads more of the same material.

The defendant also insists that he was not required, under the terms of his contract with plaintiff to make payment for any of the material ordered until there had been a delivery to him of all of the material which plaintiff had in his possession. This defense cannot be sustained. The contract was not for any specific quantity of scrap iron; it was indefinite as to the amount that was to be delivered to the defendant, and, in that the contract contained no express provision as to the time of payment, it will be presumed that payment became due as of the date of the delivery of the material.

Finding no reversible error in the record, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

Finding no reversible error in the record, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

93 - 22513

W. C. SWIGART,
Appellant,

vs.

HARRY J. STOOPS, FRANK McKEY, Trustee in Bankruptcy of the Estate of Harry J. Stoops, Bankrupt, C. C. MITCHELL and BATES MACHINE COMPANY, a corporation,
Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

204 I.A. 194

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit Court of Cook County.

On and prior to October 10, 1914, the defendant, Harry J. Stoops, was indebted to various persons at Maquoketa, Iowa, in the sum of about $17,600, the payment of which he had secured by the execution and delivery of a mortgage on a 640 acre farm located in Nebraska. W. C. Swigart, the complainant, was the owner of an interest in this mortgage. The question in controversy is as to the right of the complainant to foreclose two certificates of stock of the Bates Machine Company, of the par value of $5,000 each, one being of preferred stock and the other of common stock. Swigart contends that these certificates of stock were in his possession as security for the payment of certain notes given by the defendant Stoops to complainant. Stoops failed to pay the notes when due, and the complainant filed his bill in the Circuit Court to foreclose upon the certificates of stock in question. These certificates were originally issued to the defendant C. C. Mitchell, who endorsed them in blank and delivered them to the defendant Stoops on October 10, 1914. At the time Stoops received the stock from Mitchell he delivered to Mitchell a trust receipt, in which he agreed to return the stock on or before 3 p. m. of October 15, 1914. On the day Stoops received the certificates he went to

W. C. BRIGHAM, Appellant, vs. HENRY J. STOOPS, FRANK MOLNAY, Trustee in Bankruptcy of the Estate of Henry J. Stoops, Bankrupt, C. C. MITCHELL and NATIONAL MACHINE COMPANY, a corporation, Appellees.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE MAYER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit Court of Cook County.

On and prior to October 10, 1914, the defendant, Harry J. Stoops, was indebted to various persons at Maquoketa, Iowa, in the sum of about $17,800, the payment of which he had secured by the execution and delivery of a mortgage on a 640 acre farm located in Nebraska. W. E. Wright, the complainant, was the owner of an interest in this mortgage.

The question in controversy is as to the right of the complainant to foreclose two certificates of stock of the Nation Machine Company, of the par value of $5,000 each, one being of preference stock and the other of common stock. Defendant contends that these certificates of stock were in his possession as security for the payment of certain notes given by the defendant Stoops to complainant. Stoops failed to pay the notes when due, and the complainant filed his bill in the Circuit Court to foreclose upon the certificates of stock in question. These certificates were originally issued to the defendant C. C. Mitchell, who endorsed them in blank and delivered them to the defendant Stoops on October 1, 1914. At the time Stoops received the stock from Mitchell he delivered to Mitchell a street receipt, in which he agreed to return the stock on or before 3 p. m. of October 12, 1914. On the day Stoops received the certificates he went to

Maquoketa, Iowa, and had a conference with Swigart and others, and later on the same day he delivered to Swigart the certificates in question as collateral security for his, Stoops', notes for the sum of $9,324.60, which was the amount, with accrued interest, due from Stoops to Swigart upon notes previously held by Swigart and certain of his associates. Payment of the earlier notes was secured by the farm mortgage of $17,600 upon the said land located in Nebraska. Swigart released Stoops' farm from the lien of this mortgage at the time he accepted the notes for $9,324.60 and the two stock certificates.

The evidence discloses that a month or two before these transactions in October were had Stoops had endeavored to procure from Swigart the release of the farm mortgage referred to, and that he informed Swigart that he was the owner of stock of the Bates Machine Company. He suggested at this time the giving of this stock as collateral security in lieu of the farm mortgage. Following this conversation Swigart and Stoops met Mitchell in Chicago, and Swigart inquired of Mitchell as to the value of the Bates Machine Company stock and was told by Mitchell that he thought it was all right. This was the only inquiry made by Swigart or any of his associates concerning the stock of the Bates Machine Company. Subsequent to the time of the delivery of the stock certificates to Swigart, Stoops was adjudicated a bankrupt.

The defendant Mitchell filed his cross-bill alleging therein that he was the owner of the stock in question; that Stoops never had any title to it, but held it as bailee only under the trust receipt referred to; that he had made frequent demands upon Stoops for the return of

Maquoketa, Iowa, and had a conference with Bangert and Stone, and later on the same day he delivered to Swigart the certificates in question as collateral security for his, Stone's, notes for the sum of $9,324.00, which was the amount, with accrued interest, due from Stone to Swigart upon notes previously held by Swigart and endorsed by his associates. Indorsement of the earlier notes was secured by the pledge mortgage of $17,800 upon the wife and household in Jackson. Swigart released Stone's from the lien of this mortgage at the time he accepted the notes for $9,324.00 and the stock certificates.

The evidence discloses that a month or so before these transactions in October were had Stone had attempted to procure from Swigart the release of his interest in certain property, but that, on informed advice, he had the owner of stock of the Union Auction Company. [illegible] of this time the giving of this stock as collateral security in lieu of the term mortgage. [illegible] and Stone met [illegible] and was told by Stone, that [illegible] Swigart inquired of Stone as to the value of the [illegible] This was the only [illegible] associates concerning [illegible] assessments in the [illegible] Stone in [illegible] owing to Swigart, [illegible]

The [illegible] alleging [illegible] was the [illegible] 16 question; that Stone never had any [illegible] it as being only [illegible] he had made frequent demands upon [illegible]

the certificates, which demands had been refused; that Stoops had no title to the certificates which he could convey or assign to the complainant herein, and that the alleged assignment did not pass any right to the possession of or title to the stock certificates.

The decree of the Circuit Court was in favor of the contentions of the defendant Mitchell, on the theory that while the evidence disclosed that Mitchell was careless and imprudent in signing his name to the certificates of stock in question, such certificates not being negotiable instruments, all persons who took them did so subject to notice of whatever rights Mitchell had in the stock the ownership of which was evidenced by the certificates.

In its decree the Circuit Court held that Swigart, complainant, acquired no title or rights in and to the stock certificates, endorsed in blank by the defendant Mitchell, and which were delivered by Stoops to Swigart as security for the payment of notes given in exchange for the mortgage.

The only question presented for decision in this court is whether the defendant Mitchell is estopped by his act in signing the certificates of stock in blank and the delivery of them to Stoops. The evidence taken on the trial shows that the complainant, Swigart, received the certificates in good faith and for a valuable consideration. The case of Otis, Admr., v. Gardner et al., 105 Ill. 436, seems to be almost exactly in point:

> "Sheridan Wait, in his lifetime, was the owner of one hundred shares of the capital stock of the Calumet and Chicago Canal and Dock Company, of the par value of $10,000, represented by certificates issued to him. Written on the back of each certificate was a blank assignment and power of attorney, that would authorize the assignee to have the stock represented by such certificates formally transferred to him on the books of the company. On the 16th day of March, 1875, Sheridan Wait endorsed the certificates by signing his name below

the certificates, which demands had been refused; that Sharpe had no title to the certificates which he could convey or assign to the complainant herein, and that the alleged assignment did not pass any right to the possession of or title to the stock certificates.

The decree of the Circuit Court was in favor of the contentions of the defendant Mitchell, on the theory that while the evidence disclosed that Mitchell was careless and imprudent in signing his name to the certification of stock in question, such certificates not being negotiable instruments, all persons who took them did so subject to notice of whatever rights Mitchell had in the stock the ownership of which was evidenced by the certificates.

In its decree the Circuit Court held that Sargent, complainant, acquired no title or rights in and to the stock certificates, endorsed in blank by the defendant Mitchell, and which were delivered by Sharpe to secure an amount for the payment of notes given in exchange for the certificates.

The only question presented for decision in this court is whether the defendant Mitchell is estopped by his act in signing the certification of stock in blank and the delivery of them to Sharpe. The evidence taken on the trial shows that the complainant, Sargent, received the certificates in good faith and for a valuable consideration. The case of Hill, Adm., v. Grocers et al., 109 Ill. 630, seems to be almost exactly in point:

"Where one sold, in the ordinary way of business, one hundred shares of the capital stock of the Grocers and Citizens Bank and took therefor, in payment, notes of the purchaser of $10,000, upon which he erected a business building, written on the back of each certificate the assignment and power of attorney, such stock was the property of the assignee to have the stock transferred to him on the books of the company. In the hands of a person who had endorsed the certificates by assigning

the blank assignment and power of attorney, and then delivered them to Chauncey T. Bowen, and took therefor his written receipt, in which it is recited, 'which said one hundred shares of stock I have borrowed of him, and agree to return on demand.' Concerning the use Bowen might make of such stock, the receipt is silent, nor does the use to be made of it by the borrower appear from any testimony in the case. Afterwards, on the 9th day of November, 1875, James M. Bowen, being indebted to Jefferson Gardner on two promissory notes, each for $4,262.25, for borrowed money, pledged these certificates of stock as collateral security for the payment of such notes, and delivered them to Gardner, endorsed in blank, as they had been received by Chauncey T. Bowen."

"It was pledged to Gardner, in the usual course of business, as collateral security for the indebtedness of the holder, and was taken in good faith, without the slightest knowledge that anyone other than the pledgor claimed or had any interest in the stock represented by the certificates. As has been seen, the certificates of stock were placed in the hands of Bowen by the intestate in such condition they could be readily sold or hypothecated by him, and if his assignee made an improper use of them, the assignor, if living, could get no relief against that which he deliberately authorized to be done, if it would affect injuriously an innocent purchaser for value, and his personal representative can have no relief that could not be granted on a like bill by the intestate, if living. The principle is, that when one of two or more persons must suffer loss, upon him whose conduct made it possible for loss to occur should the consequences ultimately rest."

It is true, as insisted by counsel for defendant Mitchell, that the blank endorsement of defendant upon the certificates of stock did not thereby render the certificates strictly negotiable instruments. This endorsement was, however, the voluntary act of the defendant. Common intelligence should have informed him that it would be an easy matter for his transferee to make any use he might see fit to make of these certificates notwithstanding the limitations of the right of such transferee as indicated by the receipt given to defendant Mitchell at the time he delivered the certificates to Stoops. To permit an owner and endorser of stock thus to deny the claims of an innocent holder thereof under

the blank endorsement and power of attorney, and then delivered them to Hanover. J. Rogers, who took transfer his written receipt, in which it is recited, 'Union and one hundred shares of stock I have borrowed of him, and agree to return on demand.' Concerning the ten shares might make of such stock, the result is silent, nor does the use to be made of it by the borrower appear from any testimony in the case. Afterwards, on the 8th day of November, 1871, Jesse L. Rowe, being indicted in Jefferson County on two criminal notes, one for $4,000.00, for borrowed money, plaited some certificates of stock on collateral security for the payment of such notes, and delivered them to Hanover, mortgaged in kind, as they had been received by Hanover J. Rogers.'

"It was pleaded in defense, on the usual course of evidence, as collateral security for the transactions of the holder, and was taken in good faith, without the slightest knowledge that anyone other than the pledgor claimed or had any interest in the stock represented by the certificates. As has been seen, the certificates of stock were placed in the hands of Rowe by the insolvents in order that they could be readily sold to repositories of them, and if are assignee made an improper use of them, the assignor, if living, could not be relief against the consequences of his misconduct, or in some proceeding for it would affect injuriously an innocent purchaser for value, and the court, if required, has the power to relief that could not be granted on a bill by the insolvents, if living. The principle is, that when one of two or more innocent persons suffer loss, from a wrong done by a [illegible] connect with [illegible] the loss to the consequences of [illegible]."

[illegible]

circumstances similar to those shown by this record would seriously interfere with a custom of transacting business that has obtained generally among bankers and brokers.

The trial judge in his oral opinion seems to have been of the view that both defendant and complainant had acted in good faith in the transactions referred to, but that the defendant, Mitchell, had in fact been guilty of negligence in delivering the certificates to Stoops. We are of the opinion that the decree in favor of the defendant is erroneous. The transfer of the stock certificates in question was made to complainant in the usual course of business. There is no basis in the evidence for the argument that the complainant acted negligently or in bad faith in receiving the stock certificates. The evidence is clear that the complainant surrendered an interest in the released mortgage amounting to $9,324.60, and he took in lieu thereof notes of Stoops for the same sum, secured by stock certificates represented to have a value of $15,000.

Counsel for complainant has cited a large number of cases which sustain his contention that the defendant, under the facts of this case, is estopped to deny the right or title of the complainant to the stock certificates. Ritz, Admr. v. Gardner, 165 Ill. 436; McCarthy v. Crawford, 238 Ill. 38; Johnson v. Wilmine, 156 Ill. App. 208; National City Bank v. Wagner, 216 Wed. 473; 1 Cook, Stocks and Stockholders, secs. 411-16.

Stoops was a defendant, and he permitted a decree pro confesso to be entered against him. There can be no doubt on this record that his conduct was grossly fraudulent with respect to the defendant Mitchell; the loss, however, occasioned by this conduct should in equity be borne by the party who by his voluntary act had placed it within the power of Stoops to perpetrate the wrong.

circumstances similar to those cases by [illegible] would certainly interfere with a course of transaction, believes that has obtained generally among bankers and brokers.

The trial judge in his oral opinion seems to have been of the view that both defendant [illegible] had acted in good faith in the transactions referred to, and that the defendant, finally, had in fact been guilty of negligence in delivering the certificates to [illegible]. We are of the opinion that the errors in favor of the defendant [illegible]. The transfer of the stock certificates in question was a [illegible] consummated in the usual course of business. There is no basis in the evidence for the argument that the defendant acted negligently or in bad faith in receiving the stock certificates. The evidence is clear that [illegible] exercised [illegible] in the released mortgage [illegible], and he took in good faith [illegible] the [illegible], secured by stock certificates [illegible]

(cited) for [illegible] under a [illegible] of cases which [illegible]. Under the facts of this case, [illegible] of this [illegible] of the complained to [illegible] Fraser, 100 [illegible] 401; [illegible] Kuhn v. Kilgore, [illegible] v. [illegible] 210 [illegible]; 1 [illegible]

[illegible]

The contract [illegible]

of this record that [illegible] respect to the [illegible] by this [illegible] his voluntary act and choice it [illegible] to jeopardize the [illegible].

In the case of Shattuck v. American Cement Co., 205 Pa. St. 197, directly in point, the court said:

> "When the certificates of stock, with the transfers in blank endorsed upon them, were placed in the hands of Stahl & Straub by Shattuck, he acted innocently and in good faith; but another, equally innocent, dealt with one of the men to whom he had entrusted his stock with all the indicia of ownership; and if one of these two innocent persons is to suffer, the rule, as everywhere recognized, is that, where one by his own act arms another with power to act for him, he who so armed the wrongdoer must suffer for the consequences of the wrongdoing."
>
> "A man is not prevented, by estoppel, from telling the truth. He is only barred from the assertion of a right or title by some previous action or conduct on his part which would render the present assertion of his right unjust. Where, for instance, the owner of shares of stock signs a letter of attorney to transfer in blank, he confers an authority upon any subsequent bona fide holder, for value, to fill in his own name, and is estopped from denying the existence of such authority. He is prevented by his own act, viz., his signature to a blank power of attorney, from asserting his title; for to permit him to insist upon it after arming another with an apparent authority to divest it, would be contrary to justice and good faith." Bispham's Principles of Equity, 5th ed., sec. 280, p. 394.

Authorities conclusive of this question are abundant.

The decree of the Circuit Court is reversed and the cause is remanded with directions to enter a decree in accordance with the prayer of the bill.

REVERSED AND REMANDED

WITH DIRECTIONS.

In the case of Bartlett v. American Express Co., 208 Ia. 81, 187, directly in point, the court said:

> "When the certificates of stock, with the transfers in blank endorsed upon them, were placed in the hands of Ethell & Estabrook by Bartlett, he acted innocently and in good faith; but another, equally innocent, dealt with one of the men to whom he had entrusted his stock with all the indicia of ownership; and if one of these two innocent persons is to suffer, the rule, as everywhere recognized, is that, where one by his own act arms another with power to act for him, he who so armed the wrongdoer must suffer for the consequences of the wrongdoing."
>
> "A man is not prevented, by estoppel, from telling the truth. He is only barred from the assertion of a right or title by some previous action or conduct on his part which would render the present assertion of his right unjust. Where, for instance, the owner of shares of stock signs a letter of attorney to transfer in blank, he confers an authority upon any subsequent bona fide holder, for value, to fill in his own name, and is estopped from denying the existence of such authority. He is prevented by his own act, viz., his signature to a blank power of attorney, from asserting his title; for to permit him to insist upon it after sending another on apparent authority to divest it, would be contrary to justice and good faith." Bigelow's principles of Equity, 5th ed., sec. 280, p. 334.

Authorities conclusive of this question are abundant.

The decree of the District Court is reversed and the cause is remanded with directions to enter a decree in accordance with the prayer of the bill.

REVERSED AND REMANDED.

All concur.

2577

98 - 22519.

CITY OF CHICAGO,
Defendant in Error,

vs.

FRANK MOGNAN,
Plaintiff in Error.

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99 - 22520

CITY OF CHICAGO,
Defendant in Error,

vs.

CHARLES DELMAR,
Plaintiff in Error.

204 I.A. 195

Error to
Municipal Court
of Chicago.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

These cases come to this court on writs of error to the Municipal Court of Chicago; by order entered in this court the cases have been consolidated for hearing.

Defendants were arrested on the 7th day of April, 1916, at 3 o'clock P. M., while standing at the bar of a saloon in the City of Chicago; they were charged with a violation of section 2012 of the Municipal Code of Chicago. Trial by a jury was waived, and the trial judge after hearing the evidence imposed a fine of $100 and costs against each defendant.

The only question raised by the defendants is that the evidence was not sufficient to support the finding and judgment of the trial court.

The judgment must be affirmed. Section 54 of the Municipal Court Act provides, in substance, that the Municipal Court shall take judicial notice of the ordinances of the City of Chicago. In the case of City v. Tearney, 187 Ill. App. 441,

38 - 28819.

CITY OF CHICAGO,
Defendant in Error,

vs.

FRANK ROGERS,
Plaintiff in Error.

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90 - 28820

CITY OF CHICAGO,
Defendant in Error,

vs.

CHARLES BRAMER,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

MR. JUSTICE DAVIS DELIVERED THE OPINION OF THE COURT.

These cases come to this court on writs of error to the Municipal Court of Chicago; by order entered in this court the cases have been consolidated for hearing.

Defendants were arrested on the 7th day of April, 1918, at 3 o'clock p.m., while standing at the bar of a saloon in the city of Chicago; they were charged with a violation of section 2412 of the Municipal Code of Chicago. Trial by a jury was waived, and the trial judge after hearing the evidence imposed a fine of $100 and costs against each defendant.

The only question raised by the defendants is that the evidence was not sufficient to support the finding and judgments of the trial court.

The judgment must be affirmed. Section 4 of the Municipal Court Act provides, in substance, that the Municipal Court shall take judicial notice of the ordinances of the city of Chicago. In the case of City v. Lorenz, 187 Ill. App. 241,

the court said:

> "While the Municipal Court act requires the Municipal Court to take judicial notice of city ordinances, there is no provision in that or any other act, so far as we are advised, requiring or authorizing this court to do so. If a party to a suit in the Municipal Court desires to have reviewed any ruling of that court involving the construction of the language of a city ordinance, such ordinance must be made a part of the record in the same manner as if the suit had been tried in the Circuit Court."

The record brought here does not contain any information as to the provisions of the ordinance for the violation of which the defendants were penalized in the Municipal Court, and for this reason, if for no other, the judgment of that court should be affirmed.

We have, however, examined the evidence taken at the trial, and are of the opinion that it was sufficient to sustain the findings and judgment of the trial court. Defendants were arrested in a saloon. The defendant Noonan testified that he had gone into the place to get a contract for painting the saloon; that he had been in Hot Springs for his health all winter; he produced a business card, which indicated that he was by occupation a painter, and also the testimony of one Mullen, who stated that he knew Noonan to be a painter; that he, Mullen, offered Noonan a contract which he refused; that he, Mullen, had met Noonan prior to the trial about once a year. Delmar claimed that he was a salesman and that he had worked for one Snell, but had not been employed by anyone for a period of five months proceding his arrest. No evidence was offered that Noonan had ever worked or performed services for anybody. Several police officers testified that the defendants were by reputation well known pickpockets. There is evidence in the record from which the court was authorized to disbelieve Delmar's statement that he had been employed by Snell; and there

the court said:

> "While the Municipal Court not requires the Municipal Court to take judicial notice of city ordinances, there is no inquisition in that or any other act, so far as we are advised, requiring or authorizing this court to do so. If a party to a suit in the Municipal Court desires to have reviewed any ruling of that court involving the construction of the language of a city ordinance, such ordinance must be made a part of the record in the same manner as if the suit had been tried in the District Court."

The record brought here does not contain any information as to the provisions of the ordinance for the violation of which the defendants were penalized in the Municipal Court, and for this reason, if for no other, the judgment of that court should be affirmed.

We have, however, examined the evidence taken at the trial, and are of the opinion that it was sufficient to sustain the findings and judgment of the trial court. Defendants were arrested in a saloon. The defendant Bowman testified that he had gone into the place to get a contract for painting the saloon; that he had been in not longer than his health all winter; he produced a business card, which indicated that he was by occupation a painter, and also the testimony of one Miller, who stated that he knew Bowman to be a painter; that he, Miller, "offered Bowman a contract which he refused; that he, Miller, had met Bowman prior to the trial about one a year. Bolmer claimed that he was a salesman and that he had worked "for one Snell, but had not been employed by anyone for a period of five months preceding his arrest. No evidence was adduced that Bowman had ever worked or performed services for anybody. Several police officers testified that the defendants were by reputation well known pickpockets. There is evidence in the record from which the court was authorized to disbelieve Bolmer's statement that he had been employed by Snell, and there

was also evidence heard from which it appeared that the defendants had "hung out," as expressed by the witnesses, in places frequented by crooks, thieves and pickpockets. Noonan testified that he had been convicted of a violation of law and had been sentenced to the reformatory at Pontiac when he was a boy.

Upon the whole record we do not believe that the finding and judgment of the trial court were so manifestly against the weight of the evidence as to warrant a reversal of the judgment; it is therefore affirmed.

AFFIRMED.

was also evidence heard from which it appeared that the defendants had "hung out," as expressed by the witnesses, in places frequented by crooks, thieves and pickpockets. Witness testified that he had been convicted of a violation of law and had been sentenced to the reformatory at Trenton when he was a boy.

Upon the whole record we do not believe that the finding and judgment of the trial court were so manifestly against the weight of the evidence as to warrant a reversal of the judgment; it is therefore affirmed.

AFFIRMED.

177 - 22604

DAN BALDINO, trading as Dan Baldino & Co.,
Appellee,

vs.

HYMAN KADISON,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

204 I.A. 197

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff obtained a judgment in the Municipal Court against the defendant for the sum of $975, and the defendant brings the case here for review.

The plaintiff is a real estate broker; he called on defendant at his home on April 19, 1913, and told him that he had a purchaser for defendant's property. At that time the parties executed a real estate contract which bound defendant to sell his property to one DiVito. This deal was never consummated, through no fault of the defendant.

Thereafter, in June, 1913, plaintiff proposed an exchange of defendant's property for the premises of one Laparsky, and at that time defendant said to plaintiff that he did not care for Laparsky's property. A few days thereafter one Gerard, an employee of plaintiff, told defendant that a trade could not be made for the Laparsky property, but that he thought that a man he had in mind would trade for defendant's place. Defendant insisted that he wanted cash for his property, and not a trade.

In April, 1914, through the efforts of a real estate broker named Vacco, the defendant entered into a contract for the exchange of his property for real estate owned by one Conforti. This exchange was part of a

177 - 25604

DAN BALDINO, trading as Dan Baldino & Co., Appellee,	
vs.	APPEAL FROM MUNICIPAL
HYMAN MADISON, Appellant.	COURT OF CHICAGO.

SOALAS 197

MR. JUSTICE DUFFY DELIVERED THE OPINION OF THE COURT.

Plaintiff obtained a judgment in the Municipal Court against the defendant for the sum of $275, and the defendant brings the case here for review.

The plaintiff is a real estate broker; he called on defendant at his home on April 13, 1915, and told him that he had a purchaser for defendant's property. At that time the parties executed a real estate contract which bound defendant to sell his property to one Mrs. Ito. This deal was never consummated, through no fault of the defendant.

Thereafter, in June, 1915, plaintiff proposed an exchange of defendant's property for the premises of one Kaperskey, and at that time defendant said to plaintiff that he did not care for Kaperskey's property. A few days thereafter one Gerard, an employee of plaintiff, told defendant that a trade could not be made for the Kaperskey property, but that he thought that a man he had in mind would trade for defendant's place. Defendant indicated that he wanted cash for his property, and not a trade.

In April, 1916, through the efforts of a real estate broker named Vance, the defendant entered into a contract for the exchange of his property for real estate by one Gorfert. This exchange was part of a

"three cornered deal." The defendant desired to obtain cash for his property, and Vacco in order to close the deal procured a person to contract with defendant for the purchase of the Conforti property which defendant had received in exchange for his premises.

Plaintiff testified that in June, 1913, he told defendant where Conforti's property was located; that he gave defendant Conforti's name as owner, and that he had sent Gerard, his employee, to see Conforti; that Gerard called on Conforti and proposed an exchange of his, Conforti's, real estate for that of the defendant; that Conforti said he would see as soon as he "got to feeling better"; that he didn't know whether he would trade or not.

Conforti testified that his conversation with Gerard occurred in April or May, 1913; that he afterwards went to Hot Springs where he remained for two months, returning to Chicago in June, 1913; that he again went to Hot Springs in January, 1914, where he stayed for two months before returning to Chicago, after which the deal was closed with defendant.

The evidence does not disclose that plaintiff or any one representing him attempted in any way to dispose of defendant's property subsequent to June, 1913, ten months before the deal was closed with Conforti, and nine months before Vacco introduced Conforti to defendant. The evidence is clear that the defendant was unwilling at any time to trade his property and that he had insisted upon a sale for cash. The trade that was finally agreed upon between defendant and Conforti was the result of the successful efforts of the agent, Vacco, in procuring a purchaser for the property of Conforti which the defendant

"three cornered deal." The defendant desired to obtain cash for his property, and Vasco in order to close the deal procured a person to contract with defendant for the purchase of the Comfort property which defendant had received in exchange for his premises.

Plaintiff testified that in June, 1913, he told defendant where Comfort's property was located; that he gave defendant Comfort's name as owner, and that he had sent Gerard, his employee, to see Comfort; that Gerard called on Comfort and proposed an exchange of his, Comfort's, real estate for that of the defendant; that Comfort said he would see as soon as he "got to feeling better"; that he didn't know whether he would trade or not.

Comfort testified that his conversation with Gerard occurred in April or May, 1913; that he afterwards went to Hot Springs where he remained for two months, returning to Chicago in June, 1913; that he again went to Hot Springs in January, 1914, where he stayed for two months before returning to Chicago, after which the deal was closed with defendant.

The evidence does not disclose that plaintiff or any one representing him attempted in any way to dispose of defendant's property subsequent to June, 1913, ten months before the deal was closed with Comfort, and nine months before Vasco introduced Comfort to defendant. The evidence is clear that the defendant was willing at any time to trade his property and that he had tendered upon a sale for cash. The trade that was finally arranged upon between defendant and Comfort was the result of the successful efforts of the agent, Vasco, in procuring a purchaser for the property of Comfort which the defendant

took in trade.

We are of the opinion that the plaintiff was not the procuring cause of the sale of defendant's real estate. The evidence shows that the plaintiff made no efforts to consummate a trade of Conforti's property for that of the defendant during a period of ten months preceding the transaction in question; he made no attempt to bring Conforti and the defendant together, and was specifically warned by the defendant that he would not consider a proposition involving a trade of his property for other real estate. It is true that the plaintiff, through his agent Gerard, had had one conversation with Conforti, and that Conforti at that time refused to seriously take up with plaintiff or his agent the question of a trade of his property for that of the defendant; and at this point, so far as the record discloses, plaintiff ceased his efforts to bring about a sale of defendant's real estate.

For the reasons indicated the judgment is reversed and judgment of nil capiat will be entered in this court.

REVERSED AND JUDGMENT HERE.

took in trade.

We are of the opinion that the plaintiff was not the procuring cause of the sale of defendant's real estate. The evidence shows that the plaintiff made no effort to consummate a trade of Conforti's property for that of the defendant during a period of two months preceding the transaction in question; he made no attempt to bring Conforti and the defendant together, and was specifically warned by the defendant that he would not consider a proposition involving a trade of his property for other real estate. It is true that the plaintiff, through his agent Conrad, had had one conversation with Conforti, and that Conforti at that time refused to seriously take up with plaintiff or his agent the question of a trade of his property for that of the defendant; and at this point, so far as the record discloses, plaintiff ceased his efforts to bring about a sale of defendant's real estate.

For the reasons indicated the judgment is reversed and judgment of nil capiat will be entered in this court.

REVERSED AND JUDGMENT NIL CAPIAT.

186 - 22613

GENERAL FIRE EXTINGUISHER CO.,
Appellant,

vs.

WILLIAM SEYMOUR,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

204 I.A. 198

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is a bill to establish a mechanic's lien. The issues presented by the pleadings were referred to a master to hear evidence and report his findings and conclusions to the court. The master reported in favor of the defendant and recommended the dismissal of the bill for want of equity. A decree was entered dismissing the complainant's bill for want of equity, and the case is brought here by plaintiff for review.

It is revealed by the evidence taken by the master that the defendant, William Seymour, in May, 1912, was the owner of a large building in Chicago which at that time was in the course of construction. Seymour, on May 16, 1912, called at the office of one Neracher, agent of complainant in Chicago, and talked with Neracher and Alfred Fritzsche, western general manager of the complainant company, with a view to employing the complainant company to complete the putting in of a sprinkler system in his building. Seymour before this time had partially installed this system through his own employees. Fritzsche, testifying, said that Seymour "stated that in addition to placing the sprinkler heads on the pipes and the air valves on the risers that there would probably be some additional work required in the way of pipe fitting as the building went

GENERAL FIRE EXTINGUISHER CO.,
Appellant,

vs.

WILLIAM STRAUSS,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE DAVIS DELIVERED THE OPINION OF THE COURT.

This is a bill to establish a mechanic's lien.

The issues presented by the pleadings were referred to a master to hear evidence and report his findings and conclusions to the court. The master recommended in favor of the defendant and recommended the dismissal of the bill for want of equity. A decree was entered dismissing the complainant's bill for want of equity, and the case is brought here by plaintiff for review.

It is revealed by the evidence taken before the master that the defendant, William Deutsch, in May, 1912, was the owner of a large building in Chicago which at that time was in the course of construction. Subject, on the 16, 1912, called at the office of the complainant, [illegible] complainant in Chicago. [illegible] fred Fritzsche, western general manager of the plaintiff company, with a view to contracting the [illegible] company to complete the putting in of a sprinkler system in the building. However, [illegible] that the sprinkler system [illegible] ing, and that [illegible] the sprinkler needs [illegible] there that there would [illegible] required in the way of pipe fitting [illegible]

along that he would want us to do, and was satisfied to have us do it on the day work basis. I drew the contract and it was signed ~~while I was there.~~" The following contract ~~referred to by Fritzsche is as follows:~~ was entered into:

"Chicago, May 16, 1912.

Mr. Wm. Seymour,
5117 Hibbard Ave.,
Chicago.

Dear Sir:-

It is understood and agreed that we are to furnish you with the number of heads required for sprinkler equipment in the building at 1501-11 Johnson street, at our regular price of $1.00 each, less 50% discount, making a net price to you of 50¢ each; any air valves required at $175 each, which includes connections excepting labor for installing same, you to buy any other materials required. Or if we furnish such materials we are to bill same to you at our best mill prices. We will furnish the labor at $1.50 per hour for fitter and helper.

If we furnish any materials outside of the air valves and sprinklers you are to pay any freight, hauling or express charges involved in the shipments or hauling of said extra materials.

We will start immediately upon arrival of material and will prosecute the work with due diligence until completion.

Very truly yours,
GENERAL FIRE EXTINGUISHER COMPANY,
By A. J. Neracher, Dept. Agt.

ACCEPTED:
WILLIAM SEYMOUR."

~~The complainant had had nothing to do with installing the sprinkler system prior to the date of the contract.~~

Coleman, contracting engineer for complainant, testified that he met Seymour in 1912; that he had with Seymour examined the premises and had reported that 1960 sprinklers would be required for the building; that he ordered the sprinklers from "our Warren plant"; that they were shipped from Warren five or six days later, "but were lost or delayed in transit. We started a tracer two weeks later." This witness testified that the usual time for freight from Warren to Chicago is ten days; that the order for sprinklers was forwarded May 17, 1912, and that the ma-

along that he would want us to do, and was satisfied to have us do it on the day work basis. I drew the contract and it was signed while I was there." The contract referred to by Whitesacre is as follows:

"Chicago, May 10, 1912.

Mr. W. Seymour,
3117 Hibbard Ave.,
Chicago.

Dear Sir:-

It is understood and agreed that we are to furnish you with the number of heads required for sprinkler equipment in the building at 1541-43 Jackson street, at our regular price of $1.00 each, less 50% discount, making a net price to you of 50¢ each; any air valves required at $1.75 each, which includes connections excepting labor for installing same, you to buy any other materials required. Or if we furnish such materials we are to bill same to you at our best mill prices. We will furnish the labor at $1.50 per hour for fitter and helper.

If we furnish any materials outside of the six valves, and sprinklers you are to pay any freight, hauling or express charges involved in the shipments or hauling of said extra materials.

We will start immediately upon arrival of material and will proceede the work with due diligence until completion.

Very truly yours,
GENERAL FIRE EXTINGUISHER COMPANY,
By A. J. Seymour, Dept. Mgr.

ACCEPTED:
WILLIAM SEYMOUR."

The complainants had had no trouble to do with installing the sprinkler system prior to the date of the contract.

Coleman, contracting engineer for complainant, testified that he met Seymour in July; that he had with Seymour examined the premises and had reported that 1500 sprinklers would be required for the building; that he ordered the sprinklers from "our Warren plant"; that they were shipped from Warren five or six days later, "but were lost or delayed in transit. We started a/ffecer two weeks later." This witness testified that the usual time for freight from Warren to Chicago is ten days; that the order for sprinklers was forwarded Nov. 17, 1912, and that the me-

terial was shipped on May 22, 1912, and arrived in Chicago July 9, 1912; that Seymour had said to him in September that he would send him a check for the bulk of the account.

There can be no doubt, however, that during the time that elapsed between the making of the contract in May, and the final abandoning of the work by complainant in September, Seymour had complained of the delay in the furnishing of the materials which he had contracted for and in the doing of the work provided for under the contract.

Boyle, an employee and witness for the complainant, testified that on August 6th Seymour had telephoned him about the payment of the bill; that he, Seymour, was very angry and sarcastic, and said he would not pay for the sprinklers until they were counted.

John F. Bross, for complainant, testified that he had charge of the work for complainant of installing the sprinklers in the building; that the work began July 15th and continued until July 24th, 1912; that he had installed for defendant 2030 sprinkler heads by screwing them into the outlets in the pipe left for them; that he returned to work in the building on the 28th day of August, and did some testing of the pipes and sprinkler heads; that the testing done at the building was done at the request of Seymour; that no testing of the pipes was done above the first floor of the seven story building, for the reason that the water pressure necessary to do this work could not be had above the first floor.

There was much evidence heard by the master in respect to the issues raised by the pleadings, and some of the testimony was conflicting. Complainant insists that it has furnished 2120 sprinkler heads, 4 air valves, and 167 hours of labor of a fitter and helper, under the written

terial was shipped on May 22, 1912, and arrived in Chicago July 9, 1912; that Seymour had said to him in September that he would send him a check for the bulk of the account.

There can be no doubt, however, that during the time that elapsed between the making of the contract in May, and the final abandoning of the work by complainant in September, Seymour had complained of the delay in the furnishing of the materials which he had contracted for and in the doing of the work provided for under the contract.

Boyle, an employee and witness for the complainant, testified that on August 6th Seymour had telephoned him about the payment of the bill; that he, Seymour, was very angry and excitable, and said he would not pay for the sprinklers until they were counted.

John W. Brown, for complainant, testified that he had charge of the work for complainant of installing the sprinklers in the building; that the work began July 15th and continued until July 24th, 1912; that he had installed for defendant 2050 sprinkler heads by screwing them into the outlets in the pipe left for them; that he returned to work in the building on the 28th day of August, and did some testing of the pipes and sprinkler heads; that the testing done at the building was done at the request of Seymour; that no testing of the pipes was done above the first floor of the seven story building, for the reason that the water pressure necessary to do this work could not be had above the first floor.

There was much evidence heard by the master in respect to the issues raised by the pleadings, one some of the testimony was conflicting. Complainant insists that it has furnished 2050 sprinkler heads, 4 air valves, and 147 hours of labor of a fitter and helper, under the written

contract with Seymour at agreed prices aggregating $2010.50, and that it has not been paid any part of this sum. For the defendant it is contended that the contract under which the claim of complainant arose is one for the installation of a complete sprinkler equipment in the building of the defendant; that complainant so delayed the doing of the work provided for in the contract as to cause serious damage to the defendant, and that the complainant has failed to perform and complete the work provided for under its agreement with the defendant.

That there was much delay in the doing of this work is, we think, without much question on this record. The contract was made on the 16th day of May, 1912. There was a delay of five days more before the goods were shipped from Warren to Chicago; the goods did not arrive in Chicago until the 9th day of July, 1912, and work upon the defendant's building was not begun by the complainant until the 15th day of July, 1912, nine weeks after the contract had been signed. There is evidence in the record from which it may be found that the delay in the shipment to some indefinite degree was caused by a railway strike, but from all of the evidence taken on this phase of the controversy it is apparent that Seymour had good reason to complain of the delay in the doing of the work and the furnishing of the materials provided for by the contract.

From the evidence relating to the circumstances which led up to the execution of the contract in question, it is obvious that the defendant, Seymour, had made a somewhat unsuccessful attempt to install a sprinkler system in his building. He had done much of the piping required for

contract with Seymour at agreed prices amounting [illegible].00, and that it has not been paid any part of this sum. For the defendant it is contended that the contract under which the claim of complainant arose is one for the installation of a complete furnace equipment in the building of the defendant; that complainant so delayed the doing of the work provided for in the contract as to cause serious damage to the defendant, and that the complainant has failed to perform and complete the work provided for under its agreement with the defendant.

That there was much delay in the doing of this work is, we think, without much question on this record. The contract was made on the 16th day of May, 1912. There was a delay of five days more before the goods were shipped from Barren to Chicago; the goods did not arrive in Chicago until the 9th day of July, 1912, and work upon the defendant's building was not begun by the complainant until the 15th day of July, 1912, nine weeks after the contract had been signed. There is evidence in the record from which it may be found that the delay in the shipment to some indefinite degree was caused by a railway strike, but in all of the evidence taken on this phase of the controversy it is apparent that Seymour had good reason to complain of the delay in the doing of the work and the furnishing of the materials provided for by the contract.

From the evidence relating to the claim upon which led up to the execution of the contract in question, it is obvious that the defendant, Jackson, had made a somewhat unsuccessful attempt to install a furnace system in his building. He had done much of the work required for

the system, but as the work progressed it developed that the pipes used would be inadequate for several reasons, for a system such as the defendant desired. These considerations led him to the making of the contract with the complainant.

It is urged on behalf of the complainant that the master improperly admitted oral testimony in connection with facts and matters not expressed or referred to in the contract itself. We do not think there was any error committed in this particular. Oral testimony is frequently admissible for the purpose of explaining circumstances attending the making of a contract, and it is a familiar rule that the consideration for the making of a written agreement may be inquired into by parol.

The real controversy here seems to be that on the part of the complainant it is said that the contract of May 16, 1912, is an express written contract, and that it is an agreement for the delivery to the defendant of a certain, specified kind of merchandise, and for the performance of certain labor for him at a fixed price per hour for such labor. The defendant insists that the contract itself expressly requires that the complainant, before it can properly claim a lien against defendant's property, must first show that it has completed and performed all of the things required of it under the contract; that the contract is one for the completion of the sprinkler equipment in the building, and that under the terms of the contract the complainant is required not only to furnish the material at the price specified in the contract, but also to furnish all other materials and all labor necessary for a complete installation of the system.

We are inclined to agree with the contention of counsel for defendant. The complainant specifically promises

the system, but as the work progressed it developed that the pipes used would be inadequate for several reasons, for a system such as the defendant desired. These considerations led him to the making of the contract with the complainant.

It is urged on behalf of the complainant that the master improperly admitted oral testimony in connection with facts and matters not expressed or referred to in the contract itself. We do not think there was any error committed in this particular. Oral testimony is frequently admissible for the purpose of explaining circumstances attending the making of a contract, and it is a familiar rule that the consideration for the making of a written agreement may be inquired into by parol.

The real controversy here seems to be that on the part of the complainant it is said that the contract of May 16, 1912, is an express written contract, and that it is an agreement for the delivery to the defendant of a certain, specified kind of merchandise, and for the performance of certain labor for him at a fixed price per hour for such labor. The defendant insists that the contract itself expressly requires that the complainant, before it can properly claim a lien against defendant's property, must first show that it has completed and performed all of the things required of it under the contract; that the contract is one for the completion of the sprinkler equipment in the building, and that under the terms of the contract the complainant is required not only to furnish the material at the price specified in the contract, but also to furnish all other materials and all labor necessary for a complete installation of the system.

We are inclined to agree with the contention of counsel for defendant. The complainant specifically promised

in the contract - drawn by itself and which for that reason will be construed more strongly against it - that "we will start immediately upon arrival of materials and will prosecute the work diligently until completion," and again, "if we furnish any materials outside of the air valves and sprinklers you are to pay any freight,hauling or express charges involved in the shipments of the hauling of said extra materials." From the use of this language it is clear that both parties to the contract had in mind at the time the contract was executed the doing of work which would or might require materials other than those specifically referred to in the first paragraph of the contract. The promise of the complainant to "prosecute the work with due diligence until completion," under the evidence may reasonably be held to refer to the work which both parties must have had in mind at the time of the making of the contract - that of the completion of the work which the defendant himself had partially performed in his building. That the parties had in mind the performance of this work generally may be assumed from other language and words in the contract. The contract provides that the complainant shall furnish "the number of heads required for sprinkler equipment * * any air valves required," and this may reasonably be held to refer to the requirements of a completed system such as under the circumstances it appears must have been the defendant's only reason for entering into the contract at all.

Complainant insists that the contract is perfectly clear and unambiguous. We do not agree with this contention. The contract is far from clear, and there is some ambiguity in its express language as to what work was intended to be performed by the complainant. Under these

in the contract - drawn by itself and which for that reason will be construed more strongly against it - that "we will start immediately upon arrival of materials and will prosecute the work diligently until completion," and again, "if we furnish any materials outside of the air valves and spinkler you are to pay our freight, hauling or expense charges involved in the shipmonts of the hauling of said extra materials." From the use of this language it is clear that both parties to the contract had in mind at the time the contract was executed the doing of work which would or might require materials other than those specifically referred to in the first paragraph of the contract. The promise of the complainant to "prosecute the work with due diligence until completion," under the evidence may reasonably be held to refer to the work which both parties must have had in mind at the time of the making of the contract - that of the completion of the work which the defendant himself had practically performed in his building. That the parties had in mind the performance of this work generally may be assumed from other language and maybe in the contract. The contract provides that the complainant shall furnish "the number of horse required for operating equipment & " any air valves required," and this may reasonably be held to refer to the requirements of a complete system such as under the circumstances it appears must have been the defendant's only reason for entering into the contract at all.

Complainant insists that the contract is perfectly clear and unambiguous. [illegible] that construction. The contract is far from clear, and there is some ambiguity in its express language as to [illegible] intended to be performed by the complainant. Under cases

circumstances we may well look to the construction placed upon the contract by the parties themselves. It is conceded that in the performance of the work required by the contract the complainant did take out about 1,000 feet of defective piping, and install adequate piping in place thereof in the system; that it had done various kinds of other work in connection with the installation, all of which indicates that the complainant itself regarded the contract as one for the completion of the system rather than as being one for the furnishing and installing of particular equipment.

It is complained that the court erred in permitting the introduction of testimony as to a conversation had with Neracher, now deceased, who at the time of the making of the contract and prior thereto was agent for complainant. We are inclined to think that this evidence should not have been admitted; however, other evidence was properly admitted which we think justified the action of the master and the chancellor.

In our opinion the evidence fairly tended to show that there was much inexcusable delay in the commencement and prosecution of the work provided for by the contract, and that the complainant has not completed the work in accordance with its agreement with the defendant. The complainant in September, 1912, abandoned the doing of further work under the contract; the evidence discloses that at that time the sprinkler system was not completed. Hence the complainant is not entitled to the lien against the premises of defendant prayed for in its bill of complaint.

The decree of the Circuit Court will be affirmed.

AFFIRMED.

circumstances we may well look to the construction placed upon the contract by the parties themselves. It is conceded that the performance of the work required by the contract the complainant did take out about 1,000 feet of defective piping, and instead adequate piping in place thereof in the system; that it had done various kinds of other work in connection with the installation, all of which indicates that the complainant itself regarded the contract as one for the completion of the system rather than as being one for the furnishing and installing of particular equipment.

It is complained that the court erred in permitting the introduction of testimony as to a conversation had with Kerscher, now deceased, who at the time of the making of the contract and prior thereto was agent for complainant. We are inclined to think that this evidence should not have been admitted; however, other evidence was properly admitted which we think justified the action of the master and the chancellor.

In our opinion the evidence fairly tended to show that there was much inexcusable delay in the commencement and prosecution of the work provided for by the contract, and that the complainant has not completed the work in accordance with its agreement with the defendant. The complainant in September, 1914, abandoned the claim of further work under the contract; the evidence discloses that at that time the heating system was not completed. Some time complainant in November filed to the film against the premises of defendant provided for in the bill of complaint.

The decree of the lower court will be affirmed.

AFFIRMED.

193 - 22620

ALMA HEIZER,
Defendant in Error,

vs.

JOHN W. HEIZER,
Plaintiff in Error.

ERROR TO CIRCUIT COURT,
COOK COUNTY.

204 I.A. 200

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

A decree was entered by the Circuit Court of Cook County on December 23, 1908, in divorce proceedings, in which Alma Heizer was complainant, and the plaintiff in error here, her husband, John W. Heizer, was defendant. The validity of that part of the decree directing the payment of alimony to the complainant is questioned here.

In June and July, 1916, the complainant made an application to the court to fix the amount of alimony due from the defendant to her and accruing from the time of the entry of the decree up to the time that the application to fix the amount of alimony was made. The record discloses that on the motion to fix the amount of this alimony the court heard the testimony of several witnesses, and on July 10, 1916, entered an order in the case as follows:

> "On motion of F. A. Woodbury and Otto Schusterman, solicitors for complainant, and the court having considered the testimony and arguments of counsel, finds the defendant, John W. Heizer, earned the sum of $6,036 and that after deducting such sums as allowed by the decree, hereinbefore entered, there is now due and unpaid to the complainant the sum of $2,862.07, and judgment entered thereon and order for execution thereon allowed."

In the original decree entered in the case on December 23, 1908, the defendant was adjudged guilty of extreme and repeated acts of cruelty towards and against the complainant, and the marriage relationship existing

165 - 22620

ALAN BRIGGS,
Defendant in Error,

vs.

JOHN W. HELMER,
Plaintiff in Error.

ERROR TO CIRCUIT COURT,
COOK COUNTY.

COPIA. 200

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT:

A decree was entered by the Circuit Court of Cook County on December 23, 1908, in divorce proceedings, in which Alan Helmer was complainant, and the plaintiff in error here, her husband, John W. Helmer, was defendant. The validity of that part of the decree directing the payment of alimony to the complainant is questioned here.

In June and July, 1910, the complainant made an application to the court to fix the amount of alimony due from the defendant to her and accruing from the time of the entry of the decree up to the time of the application to fix the amount of alimony was made. The record discloses that on the motion to fix the amount of this alimony the court heard the testimony of several witnesses, and on July 10, 1910, entered an order in the case as follows:

"On motion of M. A. Woodbury and the complainant, solicitors for complainant, and the court being advised, considered the testimony and arguments of counsel, finds the defendant, John W. Helmer, owed the sum of $2,000 and that after deducting such sums as allowed by the decree, hereinbefore entered, there is now due and payable to the complainant the sum of $2,880.07, and judgment is entered therefor and order the execution thereon stayed."

In the original decree entered in the case on December 23, 1908, the defendant was adjudged guilty of extreme and repeated acts of cruelty towards and against the complainant, and the marriage relationship existing

between the complainant and the defendant was dissolved, and it was further ordered in the decree that the defendant pay alimony to the complainant - "after the deduction of such items of expenditure as car fare, dues in his labor union and life insurance dues and such other expenses as are necessarily connected with his employment, do pay weekly, beginning with the week ending January 2, 1909, to the complainant, Alma Heizer, as alimony for the support of herself and their said two minor children, Pearl Heizer and Esther Heizer, one-half of his weekly earnings, until the further order of the court."

The main contention of the defendant is that the court was without jurisdiction to enter the order of July 10, 1916, for the reason that it is based upon a decree that is in part void - that that part of the decree which directs the payment of alimony by the defendant to complainant is void because the court had no power to enter a judgment for the payment of money depending or to be calculated upon the happening of future events indefinite and uncertain in their nature.

The decree in this cause is not for a definite, certain sum of money; execution could not issue upon it, and its enforcibility would of necessity depend upon the finding of facts which could in no way be determined by reference to any of the recitations or language of the decree itself.

In Smith v. Trimble, 27 Ill. 152, the court held that a decree should ascertain the precise amount that was required to be paid, and that this amount should not be left to computation.

In Carter v. Lewis, 29 Ill. 500, the Supreme Court held that a decree for $700 "and upwards" was valid only as to the certain sum of $700 and void for the residue.

between the complainant and the defendant was dissolved, and it was further ordered in the decree that the defendant pay alimony to the complainant - "after the deduction of such items of expenditure as our law, dues in the labor union and life insurance dues and such other expenses as are necessarily connected with his employment, he pay weekly, beginning with the week ending January 2, 1909, to the complainant, Alma Heiser, as alimony for the support of herself and their said two minor children, Ferdinand Heiser and Esther Heiser, one-half of his weekly earnings, until the further order of the court."

The main contention of the defendant is that the court was without jurisdiction to enter the order of July 20, 1910, for the reason that it is based upon a decree that is in part void - that that part of the decree which directs the payment of alimony by the defendant to complainant is void because the court had no power to enter a judgment for the payment of money depending or to be calculated upon the happening of future events indefinite and uncertain in their nature.

The decree in this case is not for a definite, certain sum of money; execution could not issue upon it, and its enforceability would of necessity lie and upon the finding of facts which could in no way be ascertained by reference to any of the resolutions or language of the decree itself.

In Dwight v. Dwight, 27 Ill. 126, the court held that a decree should ascertain the precise amount that was required to be paid, and that this issue should not be left to computation.

In Carter v. Lewis, 45 Ill. 304, the supreme Court held that a decree for $700 "and upwards" was void only as to the certain sum of $700 and void for the remainder.

The case of Morrison v. Smith, 130 Ill. 304, relied upon by counsel for complainant, is in fact against their contention. The Supreme Court held that while the decree was technically erroneous in not finding the sum to be paid, including the interest, yet as the dates were given, so that the amount rested only in computation, the error was an immaterial one and the case was within the rule which treats that as certain which is capable of being rendered certain. "A mere computation of six per cent. interest upon a given sum for a given period of time involves a methematical calculation which can lead to but one result."

Any amount which might be claimed to be due under the decree in the case at bar could not be determined at any time by a mere mathematical calculation; that amount, in the nature of things, would vary with the terms and character of the employment as well as the expenses incurred by the defendant.

The right of complainant to alimony is derived from section 18 of chapter 40, Hurd's Revised Statutes, and the decisions of the courts of the State of Illinois interpreting that statute. In Ross v. Ross, 78 Ill. 402, it was held that where a decree for alimony gave the complainant substantially all the defendant's property and ordered her to pay his debts, it was evident that a portion of the alimony allowed was for the purpose of paying such debts, and that such decree was without precedent and unwarranted. While this authority does not discuss the precise question involved here, it is evident that the Supreme Court in cases of this kind is opposed to any radical departure from the power to fix alimony as prescribed by the statute and as such statute is interpreted by the courts.

In Phillips v. Edsall, 127 Ill. 535, it was held

The case of Ferrigan v. Smith, 180 Ill. 304, relied upon by counsel for complainant, is in fact against their contention. The Supreme Court held that while the decree was technically erroneous, in not fixing the sum to be paid, including the interest, yet as the dates were given, so that the amount rested only in computation, the error was an immaterial one and the case was within the rule which treats that as certain which is capable of being rendered certain. "A mere computation of six per cent. interest upon a given sum for a given period of time involves a mathematical calculation which can lead to but one result."

Any amount which might be claimed to be due under the decree in this case at bar could not be determined at any time by a mere mathematical calculation; that amount, in the nature of things, would vary with the terms and character of the employment as well as the expenses incurred by the defendant.

The right of complainant to alimony is derived from section 18 of chapter 40, Rev. S. Revised Statutes, and the decisions of the courts of the state of Illinois interpreting that statute. In Jones v. Jones, 76 Ill. 274, it was held that where a decree for alimony gave the complainant substantially all the defendant's property and ordered her to pay his debts, it was evident that a portion of the alimony allowed was for the purpose of paying such debts, and that such decree was without precedent and unwarranted. While this authority does not discuss the precise question involved here, it is evident that the Supreme Court in cases of this kind is opposed to any radical departure from the power to fix alimony as prescribed by the statute and as such statute is interpreted by the courts.

In Phillips v. Edwards, 127 Ill. 283, it was held

that a decree for the payment of money is sufficiently certain though it does not state the exact amount of principal and interest, where it finds the necessary facts so that the exact sum due is only a matter of computation.

There are no facts found in the decree in the case at bar from which by any method of computation can be determined the sum that complainant insists is due her by way of alimony under the decree. Cases are numerous to the effect that a valid judgment or decree for the payment of money must provide for the payment of a fixed, definite sum. Counsel for complainant insist that the sum required to be paid under the decree in this case can be rendered certain by the application of the equitable rule that that is certain which may be rendered certain. We do not think that this rule has any application at all to the question raised here. Did the decree in this case recite any data from which the amount due under the decree could be determined by computation the rule could be applied, but uncertain and indefinite provisions of a decree for the payment of money cannot be rendered certain by resort to facts or matters exterior to the decree itself.

On motion of the complainant the trial court heard evidence, and in fact entered into the trial of an issue of fact for the purpose of determining the earnings of the defendant subsequent to the entry of the decree; having determined the amount of such earnings certain personal expenses were deducted therefrom, and an order was entered by the court for the payment to the complainant of one-half of the remainder so found. In our opinion the court was without jurisdiction to enter the order complained of.

It is claimed that certain errors were committed in the conduct of the hearing, and that the court also erred

that a decree for the payment of money is sufficiently certain though it does not state the exact amount of principal and interest, where it finds the necessary facts so that the exact sum due is only a matter of computation.

There are no facts found in the decree in the case at bar from which by any method of computation can be determined the sum that complainant, Imelda is due her by way of alimony under the decree. Cases are numerous to the effect that a valid judgment or decree for the payment of money must provide for the payment of a fixed, definite sum. Counsel for complainant insist that the sum required to be paid under the decree in this case can be rendered certain by the application of the equitable rule that that is certain which may be rendered certain. We do not think that this rule has any application at all to the question raised here. Did the decree in this case recite any date from which the amount due under the decree could be determined by computation the rule could be applied, but uncertain and indefinite provisions of a decree for the payment of money cannot be rendered certain by resort to facts or matters exterior to the decree itself.

On motion of the complainant the trial court heard evidence, and in fact entered into the trial of an issue of fact for the purpose of determining the earnings of the defendant subsequent to the entry of the decree fixing determined the amount of such earnings certain personal expenses were deducted therefrom, and an order was entered by the court for the payment to the complainant of one-half of the remainder so found. In our opinion the court was without jurisdiction to enter the order complained of.

It is claimed that certain errors were committed in the conduct of the hearing, and that the court also erred

in rulings as to the admissibility of certain evidence. We do not, in view of what has been said with reference to the power of the trial court to enter any order for the fixing of alimony in accordance with the decree, deem it necessary to decide these questions.

The order and judgment of the Circuit Court, entered in that court on the 10th day of July, 1916, will be reversed.

REVERSED.

in rulings as to the admissibility of certain evidence. We do not, in view of what has been said with reference to the power of the trial court to enter any order for the fixing of alimony in accordance with the decree, deem it necessary to decide these questions.

The order and judgment of the circuit court, entered in that court on the 16th day of July, 1916, will be reversed.

REVERSED.

207 - 22635

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

J. E. KELLY,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

204 I.A. 201

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The defendant, J. E. Kelly, on August 14, 1916, about one o'clock in the afternoon, was driving an automobile west on Washington boulevard between 40th and 56th avenues, in Chicago. The automobile was followed by the complaining witness, a police officer, who placed the defendant under arrest and charged him with a violation of section 10 of the Motor Vehicle Law. On trial in the Municipal Court of Chicago, a jury having been waived, the court imposed a fine of five dollars upon the defendant. The case is brought here by writ of error to review the judgment of that court.

Section 10 of the Motor Vehicle Law is as follows:

> "No person shall drive a motor vehicle or motor bicycle upon any public highway of this State at a speed greater than is reasonable and proper, having regard to the traffic and the use of the way, or so as to endanger the life or limb or injure the property of any person. If the rate of speed of any motor vehicle or motor bicycle operated upon any public highway in this State, where the same passes through * * * the residence portion of any incorporated city, town or village, exceeds fifteen miles an hour, * * * such rates of speed shall be prima facie evidence that the person operating such motor vehicle or motor bicycle is running at a rate of speed greater than is reasonable and proper, having regard to the traffic and the use of the way, or so as to endanger the life or limb or injure the property of any person."

The police officer testified that he was riding on a motorcycle and had followed the automobile of defendant for a distance of fifteen blocks, and that the automobile

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. J. E. KELLY, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BRAYER DELIVERED THE OPINION OF THE COURT.

The defendant, J. E. Kelly, on August 14, 1916, about one o'clock in the afternoon, was driving an automobile west on Washington boulevard between 40th and 50th avenues, in Chicago. The automobile was followed by the complaining witness, a police officer, who placed the defendant under arrest and charged him with a violation of section 10 of the Motor Vehicle law. On trial in the Municipal Court of Chicago, a jury having been waived, the court imposed a fine of five dollars upon the defendant. The case is brought here by writ of error to review the judgment of that court.

Section 10 of the Motor Vehicle law is as follows:

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The police officer testified that he was riding on a motorcycle and had followed the automobile of defendant for a distance of fifteen blocks, and that the automobile

was moving for that distance at the rate of twenty-seven miles an hour. The defendant and his three witnesses testified that the automobile had moved at a rate of speed of from eighteen to twenty miles an hour; and on the testimony of defendant and those witnesses, if the testimony of the officer be disregarded, a prima facie case was made out for the people under the law.

It is insisted, however, that the evidence tended to show that Washington boulevard between 40th and 56th avenues at the time in question was not crowded and the traffic conditions were such that the speed at which defendant and his witnesses say that the car was moving could not be said to have been unreasonable and improper. The only evidence as to the traffic condition of the street at the time in question was that of J. C. Kelly, who testified that "the car traffic was not crowded." The evidence does show that there were several automobiles on the street at and during the time that the automobile was followed by the police officer. The evidence as to the rate of speed at which the car was moving was conflicting.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

was moving for that distance at the rate of twenty-seven miles an hour. The defendant and his three witnesses testified that the automobile had moved at a rate of speed of from eighteen to twenty miles an hour; and on the testimony of defendant and these witnesses, if the testimony of the officer be disregarded, a *prima facie* case was made out for the people under the law.

It is insisted, however, that the evidence tended to show that Washington boulevard between 40th and 50th avenues at the time in question was not crowded and the traffic conditions were such that the speed at which defendant and his witnesses say that the car was moving could not be said to have been unreasonable and improper. The only evidence as to the traffic condition of the street at the time in question was that of J. O. Kelly, who testified that "the car traffic was not crowded." The evidence does show that there were several automobiles on the street at and during the time that the automobile was followed by the police officer. The evidence as to the rate of speed at which the car was moving was conflicting.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

213 - 22641

FITZPATRICK BROS., a corporation, Appellant, vs. JOHN E. CULHANE and M. H. CULHANE, trading as Halo Chemical Co., Appellees.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

204 I.A. 203

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Fitzpatrick Bros., a corporation, was engaged in the business of manufacturing and selling a cleaning and scouring powder, which it claims was adapted for household use; to designate this article it had adopted the trade name of "Kitchen Klenzer." It caused this trade name to be registered in the State of Illinois on May 8, 1912, and it also made application for the registration of a label containing its trade-mark, with this name thereon, in the United States patent office in 1908 and at subsequent times.

In the bill filed by complainant, Fitzpatrick Bros., it was alleged that the defendants, John E. Culhane and M. H. Culhane, doing business as Halo Chemical Company, disregarding the rights of the complainant, had fraudulently and with an intent to deceive the public and to induce the public to purchase other and spurious goods by mistake for those of complainant and thereby to obtain its trade and business, and with the intent to obtain the benefit of complainant's advertisements, have recently and now are unlawfully and without the permission of the complainant selling and offering for sale in the city of Chicago and elsewhere large quantities of a cleaning preparation not manufactured by the complainant, under a name embodying the words "Kitchen Cleanser" conspicuously placed upon their label; that the de-

PITKIN-RIDLON BROS.,
a corporation,
Appellant,

vs.

JOHN K. GUERNSEY and K. H.
GUERNSEY, trading as Halo
Chemical Co.,
Appellees.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

204 I.A. 203

MR. JUSTICE DUFFY DELIVERED THE OPINION OF THE COURT.

Pitkin-Ridlon Bros., a corporation, was engaged in the business of manufacturing and selling a cleaning and scouring powder, which it claims was adapted for household use; to designate this article it had adopted the trade name of "Kitchen Klenzer." It caused this trade name to be registered in the State of Illinois on May 6, 1912, and it also made application for the registration of a label containing its trade-mark, with this same name, in the United States patent office in 1908 and at subsequent times.

In the bill filed by complainant, Pitkin-Ridlon Bros., it was alleged that the defendants, John K. Guernsey and K. H. Guernsey, doing business as Halo Chemical Company, disregarding the rights of the complainant, had fraudulently and with an intent to deceive the public and to induce the public to purchase other and spurious goods by mistake for those of complainant and thereby to obtain its trade and business, and with the intent to obtain the benefit of complainant's advertisements, have recently and now are unlawfully and without the permission of the complainant selling and offering for sale in the city of Chicago and elsewhere large quantities of a cleaning preparation not manufactured by the complainant, under a name embodying the words "Kitchen Cleanser" conspicuously placed upon their label; that the de-

fendants intend and threaten to continue the use of the said name, Kitchen Cleanser, in connection with the cleaning preparation sold by them, and that by so doing they, the defendants, will cause the complainant great and irreparable injury; that complainant has suffered damages to the extent of more than $5,000 by reason of the alleged unlawful acts of the defendants. The complainant prays in its bill that the defendants be enjoined from employing or using the name "Kitchen Cleanser" in connection with their said cleaning preparation on any label, advertisement, etc., and that the defendants account to the complainant for the amount of such cleaning preparation sold by reason of the alleged unlawful marketing, labeling and advertising of such preparation.

A demurrer was filed to the bill of complaint, which was overruled by the court, and the defendants filed separate answers. The defendant M. H. Culhane answered denying all knowledge of the matters and things referred to in the bill of complaint, and denying that he had any interest or connection whatever with any business carried on by John M. Culhane.

In the separate answer of John M. Culhane it was denied, inter alia, that the public and trade in general acquiesced in any alleged exclusive right of complainant to use the words claimed by them for the said preparation, and he further alleged that such words and similar words had been used by other manufacturers and the trade generally to designate and describe similar preparations which are well adapted to serve the purposes of kitchen cleansers. This defendant further denied that the complainant had been injured in any sum by reason of any act or omission on his

[illegible] intend and threaten to continue the use of the said name, Kitchen Cleaner, in connection with the cleaning preparation sold by them, and that by so doing they, the defendants, will cause the complainant great and irreparable injury; that complainant has suffered damage to the extent of more than $5,000 by reason of the alleged unlawful acts of the defendants. The complainant prays in its bill that the defendants be enjoined from employing or using the name "Kitchen Cleaner" in connection with their said cleaning preparation on any label, advertisement, etc., and that the defendants account to the complainant for the amount of such cleaning preparation sold by reason of the alleged unlawful advertising, labeling and advertising of such preparation.

A demurrer was filed to the bill of complaint, which was overruled by the court, and the defendants filed separate answers. The defendant [illegible] denying all knowledge of the matters and things referred to in the bill of complaint, and denying that [illegible] cause or connection whatever with [illegible] by John [illegible] Williams.

In the separate answer of [illegible] Williams it was denied, inter alia, that the [illegible] and [illegible] acquiesced in any alleged violation [illegible] to use the words claimed by them for [illegible] and he further alleged that such words [illegible] been used by other manufacturers [illegible] dealers and effective similar preparations [illegible] admitted to have the business of [illegible] defendant further [illegible] and [illegible] in [illegible] of the

part, and generally the defendant John E. Culhane denied each and all the material allegations in the bill of complaint.

Trial was had in the Circuit Court of Cook County, and at the close of the hearing the court entered a decree dismissing the bill of complaint. The case is brought here to reverse this decree of the trial court.

The evidence satisfactorily proves that the defendant M. H. Culhane had no connection with or interest in the business owned by his brother, John E. Culhane, and as to him, at least, there can be no question of the correctness of the finding of the trial court.

As proof of the allegations of its bill of complaint the complainant introduced in evidence copies of certain labels and advertisements used by complainant in its business, and also certain other labels and advertisements used and circulated by the defendant, John E. Culhane, in his business. An inspection of the exhibits will show that the labels used by defendant are not well calculated to deceive any person of common intelligence who might desire to purchase the cleaning preparation sold by complainant; they are in no sense similar in either shape, color, design or language, with those used by complainant, and the difference is easily noticeable. The most striking part of the label used by defendant contains the words "Halo Kitchen and Bathroom Cleanser, Manufactured by Halo Chemical Co., Chicago, Ill." The principal section of the advertisements of complainant contains the words "Kitchen Klenzer, copyright 1910, Antiseptic, Cleans-Scours Scrubs-Polishes, made by Fitzpatrick Bros., Chicago." Complainant introduced a copy of a newspaper advertisement of the Adolph Market Co. in which, among many other articles, is advertised a cleanser as follows: "Lalo Parlor and Kitchen Cleanser 15¢." In another advertisement

part, and generally the defendant John H. Quinnee denied each and all the material allegations in the bill of complaint.

Trial was had in the Circuit Court of Cook County, and at the close of the hearing the court entered a decree dismissing the bill of complaint. The case is brought here to reverse this decree of the trial court.

The evidence satisfactorily proves that the defendant H. H. Quinnee had no connection with or interest in the business owned by his brother, John H. Quinnee, and as to him, at least, there can be no question of the correctness of the finding of the trial court.

As proof of the allegations of its bill of complaint the complainant introduced in evidence copies of certain labels and advertisements used by complainant in its business, and also certain other labels and advertisements used and circulated by the defendant, John H. Quinnee, in his business. An inspection of the exhibits will show that the labels used by defendant are not well calculated to deceive any person of common intelligence who might desire to purchase the cleaning preparation sold by complainant; they are in no sense similar in either shape, color, design or language, with those used by complainant, and the difference is easily noticeable. The most striking part of the label used by defendant contains the words "Jello Kitchen and Laundry Cleaner, manufactured by Jello Chemical Co., Chicago, Ill." The principal section of the advertisements of complainant contain the words "Kitchen Cleaner, copyright 1911, Antiseptic, Cleans-Scours Scrubs-Polishes, made by Interstate Mfg., Chicago." Complainant introduced a copy of a newspaper advertisement of the Adolph Lerner Co. in which, among many other articles, is advertised a cleaner as follows: "Jello Parlor and Kitchen Cleaner 15¢." In another advertisement

by the same company an article described as "Halo Kitchen and Bathroom Cleanser" also appears.

The evidence taken at the trial tends to prove that the word "cleanser" as part of a name used in connection with preparations adapted to household cleaning purposes was used by manufacturers and dealers other than complainant for many years prior to the adoption by complainant of the trade name "Kitchen Klenzer." On cross-examination Mr. Fitzpatrick, president of the complainant corporation, testified that there were on the market other cleansers, and specified as an instance of the use of such words in the trade the fact that a cleaning preparation could be bought in the market known as "Dutch Cleanser." From an examination of the evidence it may be concluded that the defendant has not unfairly or unlawfully copied the advertising matter, the trade-mark or trade name used by the complainant in its business. As stated, the advertising matter used by the defendant is not at all similar to nor does it resemble that used by the complainant.

The bill of complaint alleges that the defendant has used the words "Kitchen Cleanser" as a trade name for the preparation sold by him in the market. The evidence does not support this allegation. The exhibits admitted in evidence show that the words used in the name adopted by defendant are, "Halo Kitchen and Bathroom Cleanser." Is the use of the name "Halo Kitchen and Bathroom Cleanser" calculated to be confused with the trade name "Kitchen Klenzer" adopted by complainant? We think not. A person of ordinary intelligence would not be misled or confused by the use of either or both of these names. Assuming, however, that the complainant is right in

by the same company on article described as "Solo Kitchen and Bathroom Cleanser" also appears.

The evidence taken at the trial tends to prove that the word "cleanser" as part of a name used in connection with preparations adapted to household cleaning purposes was used by manufacturers and dealers rather than complainant for many years prior to the adoption by complainant of the trade name "Kitchen Klenzer." On cross-examination Mr. Fitzpatrick, president of the complainant corporation, testified that there were on the market other cleansers, and specified as an instance of the use of such words in the trade the fact that a cleaning preparation could be bought in the market known as "Dutch Cleanser." From an examination of the evidence it may be concluded that the defendant has not unfairly or unlawfully copied the advertising matter, the trade-mark or trade name used by the complainant in its business. As stated, the advertising matter used by the defendant is not at all similar to nor does it resemble that used by the complainant.

The bill of complaint alleges that the defendant has used the words "Kitchen Klenzer" as a trade name for the preparation sold by him in the market. The evidence does not support this allegation. The exhibits submitted in evidence show that the words used in the name adopted by defendant are, "Solo Kitchen and Bathroom Cleanser." In the use of the name "Solo Kitchen and Bathroom Cleanser" associated in a combined with the trade name "Kitchen Klenzer" [illegible] by complainant. We think not. A person of ordinary intelligence would not be misled or confused by the use of cleanser in both of these names. Assuming, however, that the contention is true in

its contention that the defendant has in fact used the words "Kitchen Cleanser" as a trade name for his cleaning preparation, would the use of such name constitute an unfair and illegal infringement upon the trade name "Kitchen Klenzer" which was adopted by complainant?

In Ball v. Siegel, 116 Ill. 137, the controversy arose over the use of the names "Ball's Health-preserving Corsets" and "Dr. Schilling's Health-preserving Corset." Deciding the case, the court said: "The words, 'health-preserving,' preceding the word, 'corset,' beyond all question but describe a quality of the corset,- i. e., an effect which its use will produce,- and cannot, therefore, be employed as a trade mark." And so here, it may reasonably be held that the words "kitchen cleanser" but describe an article adapted for a particular use or purpose; the name is definitely descriptive of the service which it is claimed may be performed by the preparations of the parties to the suit, i. e., that of kitchen and house cleaning.

It is not claimed or proved that the defendant here has adopted the form of letters or spelling used by the complainant. In Ball v. Siegel, supra, the court said:

> "Conceding that appellants had a trade mark in the name of 'Ball,' and in the picture and words and form of lettering on the labels pasted on their boxes, it is evident that the name, 'Schilling,' or 'Dr. Schilling,' could not be mistaken for that of 'Ball,' and that if the picture, words and form of lettering on the labels pasted on appellees' boxes were totally unlike those pasted on appellants' boxes, the one could not reasonably be mistaken for the other, and there could, in neither respect, be any infringement of a trade mark. The only question is, whether appellees were, by devices and false representations, as charged in the bill, selling or causing to be sold their corset, when the purchasers were desiring to purchase, and supposed they were purchasing, appellants' corset."

The defendant testified that he always described the preparation manufactured and sold by him by its trade

[illegible] contention that the defendant has in fact used the words "kitchen cleanser" as a trade mark for his cleaning preparation, would the use of such words constitute an unfair and illegal infringement when the trade name "kitchen cleanser" which was adopted by complainants

In Kall v. Blount, 238 U.S. 157, the controversy arose over the use of the words "Kalli's Peanut-preserving Butter" and "Mr. Blount's Peanut-preserving Butter." Deciding the case, the court said: "The words, 'Peanut-preserving,' preceding the word, 'Butter,' assume all qualification but describe a quality of the product. - i. e., an effect which its use will produce, - that of preserving, or employed as a trade mark." [illegible] In any reasonable [illegible] the words "kitchen cleanser" [illegible] an article [illegible] is definitely descriptive of the article [illegible] may be performed by the [illegible] of the article [illegible] i. e., [illegible] of kitchen [illegible].

It is not claimed or proved that the defendants [illegible] in letters or [illegible] the [illegible]. Kall v. Blount, [illegible] court said:

> "[illegible] Kalli's [illegible] of Butter [illegible] words, [illegible] evident [illegible] could not be [illegible] 'Butter,' [illegible] the jurisdiction [illegible] 'preserving' [illegible] phrase or [illegible] 'preserving' [illegible] phrase or [illegible] 'Butter' [illegible] of Kalli's [illegible] Butter, [illegible] Butter [illegible] Butter [illegible] distinguishable [illegible]."

The defendant [illegible] the complainants [illegible] the preservation [illegible] to [illegible]

name, "Halo." There is no evidence in the record from which it can be said that any person had been deceived by the use of the trade name adopted by the defendant. It does appear that certain merchants had sold and had purchased the article made by the defendant as "Kitchen Cleanser," but there is no evidence in the record from which it appears that either such merchants or their customers had been in any way deceived into believing that the defendant's preparation was in fact that of the complainant.

It is our opinion that the words used by the defendant were not calculated in any way to infringe upon the rights of the complainant. In doing its business and in adopting a name to describe its article, the complainant has seen fit to employ a name of an ordinary descriptive character. This the law says it cannot do in such manner as to exclude others from using in business the same descriptive words. It would serve no useful purpose to cite authorities on this question; they are numerous, and practically unanimous in the holding that a privilege in the exclusive use of descriptive words cannot in any manner legally be acquired.

In a recent English case, decided by the House of Lords November 30, 1916, on appeal from the Court of Appeal (32, The Times L. R., 311), it was held that the term "malted milk" was a descriptive designation, and that the plaintiffs, who manufactured and sold a preparation known as "Horlick's Malted Milk," were not entitled to restrain the defendant from manufacturing and selling a similar preparation under the name "Hedley's Malted Milk."

The decree of the Circuit Court should be affirmed for the reasons: First, that the defendant has not in fact adopted the words "Kitchen Cleanser" as a trade name for the preparation sold by him; second, that even if it

name, "Hario." There is no evidence in the record from which it can be said that any person had been deceived by the use of the trade name adopted by the defendant. It appears that certain merchants had sold and had purchased the article made by the defendant as "Kitchen Glassware," but there is no evidence in the record from which it appears that either such merchants or their customers had been in any way deceived into believing that the defendant's preparation was in fact that of the complainant.

It is our opinion that the words used by the defendant were not calculated in any way to infringe upon the rights of the complainant. In doing its business and in adopting a name to describe its product, the complainant has been its employ a name of an entirely descriptive character. While the law says it cannot do in such manner as to confuse others from using an honest and descriptive word.

It would have no useful purpose to dwell [illegible] on this question; they are numerous, but practically [illegible] in the holding that a privilege in the exclusive use of a descriptive word cannot in any manner [illegible] be acquired.

In a recent [illegible] case, [illegible] the case of Lord Herschel [illegible], [illegible] from the Court of Appeal (37 [illegible] 231), it was [illegible] that the word "[illegible]" [illegible] a descriptive designation, and that the [illegible] qualities, [illegible] and held [illegible] no "[illegible]" [illegible] the defendant [illegible] preparation under the name "[illegible]" [illegible].

The decree of [illegible] affirmed for the reasons [illegible].

In [illegible] adopted the words "[illegible]" [illegible] name for the preparation [illegible] it

be conceded that the defendant had made use of such words as a trade name, such name and the words that go to form it are so definitely descriptive in character as that the defendant would have a clear right to use the same, notwithstanding the use by complainant of the name adopted by it; third, the evidence does not disclose that the defendant attempted to or that he did deceive the public in the sale of the preparation made by him or that he did by the use of any labels, trade-marks or advertising matter lead purchasers into the belief that such preparation was the article dealt in by the complainant.

The decree of the Circuit Court will be affirmed.

AFFIRMED.

be conceded that the defendant had made use of such words as a trade name, such name and the words that go to form it are so definitely descriptive in character as that the defendant would have a clear right to use the same, notwithstanding the use by complainant of the name adopted by it; third, the evidence does not disclose that the defendant attempted to or that he did deceive the public in the sale of the preparation made by him or that he did by the use of any labels, trade-marks or advertising matter lead purchasers into the belief that such preparation was the article dealt in by the complainant.

The decree of the Circuit Court will be affirmed.

AFFIRMED.

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JAMES F. BISHOP, Administrator of the Estate of Carl O. Wiberg, deceased,
Plaintiff in Error,

vs.

CHICAGO RAILWAYS COMPANY,
Defendant in Error.

ERROR TO CIRCUIT COURT, COOK COUNTY.

204 I.A. 205

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff filed his declaration in the Circuit Court of Cook County, alleging therein that the defendant, Chicago Railways Company, on August 25, 1912, while in possession of a certain street car, and while plaintiff's intestate with due care was walking upon and along Milwaukee avenue, at or near its intersection with Lowell avenue, in Chicago, through its, defendant's, servants, negligently ran said car into plaintiff's intestate, thereby injuring him, from the effects of which injury he died.

The case was tried by a jury, and at the close of plaintiff's case the court directed the jury to find the issues for the defendant. The jury, as directed, rendered a verdict finding the defendant not guilty. Judgment was entered on this verdict, and the plaintiff brings the case here by writ of error for review.

Milwaukee avenue extends in a northwesterly and southeasterly direction through the northwest section of the city of Chicago. A short distance south of where the accident happened Milwaukee avenue is intersected by Addison street, which extends east and west, and Milwaukee avenue is again intersected by Lowell avenue, a north and south street,

JAMES P. BISHOP, Administrator
of the Estate of Carl O. Wiberg,
deceased,
Plaintiff in Error,

vs.

CHICAGO RAILWAYS COMPANY,
Defendant in Error.

ERROR TO CIRCUIT COURT,
COOK COUNTY.

204 I.A. 209

MR. JUSTICE DAVIS DELIVERED THE OPINION OF THE COURT.

Plaintiff filed his declaration in the Circuit Court of Cook County, alleging thereon that the defendant, Chicago Railway Company, on August 23, 1912, while in possession of a certain street car, and while plaintiff's intestate with due care was walking upon and along Milwaukee avenue, at or near its intersection with Lowell avenue, in Chicago, through its, defendant's, servants, negligently ran said car into plaintiff's intestate, thereby injuring him, from the effects of which injury he died.

The case was tried by a jury, and at the close of plaintiff's case the court directed the jury to find the issues for the defendant. The jury, as directed, rendered a verdict finding the defendant not guilty. Judgment was entered on this verdict, and the plaintiff brings the case here by writ of error for review.

Milwaukee avenue extends in a northwesterly and southeasterly direction through the northwest section of the city of Chicago. A short distance south of where the accident happened Milwaukee avenue is intersected by Addison street, which extends east and west, and Milwaukee avenue is again intersected by Lowell avenue, a north and south street.

at a point a short distance north of the place where the accident occurred. According to the testimony of plaintiff's witnesses the accident happened on Milwaukee avenue about half way between Addison street and Lowell avenue, which two latter streets intersect Milwaukee avenue at points between 400 and 500 feet apart.

For the plaintiff Mrs. Carolina Mittag testified that she was riding on the car which struck deceased; that the car was bound northwest; that she first saw the deceased when he "flew across from the car, in front of the car. I was on the right side of the car, facing north on Milwaukee avenue. The first thing I seen the man flying, after the car was going past Addison street. I seen the man flying in front of the car, and flying across over to the curbstone on Milwaukee avenue; it was just about half a block west of Addison avenue, I think. The car went about 40 or 50 feet after it struck him. I did not hear any bell or any whistle or anything sounded on the car up to the time the man was struck. The last street the car crossed was Addison. The street ahead of that is Lowell avenue, which is northwest of Addison. There is a high school right on the right side of Milwaukee avenue."

On behalf of the plaintiff Adolph Mittag, husband of the witness Carolina Mittag, testified that he was riding on the right side of the front platform of the car. "I was going northwest. I was the only one besides the motorman. I saw that the car hit the man; he was about five or six feet ahead of the car, and then he crossed; the right side of the car hit him. I did not see him before the car struck him; I saw him just when the car struck him. I was looking north when the car struck him. There was one automobile after another after the man was struck and before. I

at a point a short distance north of the place where the accident occurred. According to the testimony of plaintiff's witnesses the accident happened on Milwaukee avenue about half way between Addison street and Lowell avenue, which two latter streets intersect Milwaukee avenue at points between 400 and 500 feet apart.

For the plaintiff Mrs. Caroline Mitting testified that she was riding on the car which struck deceased; that the car was bound northwest; that she first saw the deceased when he "flew across from the car, in front of the car. I was on the right side of the car, facing north on Milwaukee avenue. The first thing I saw the man flying, after the car was going past Addison street. I seen the man flying in front of the car, and flying across over to the crossbeams on Milwaukee avenue; it was just about half a block west of Addison avenue, I think. The car went about 40 or 50 feet after it struck him. I did not hear any bell or any whistle or anything sounded on the car or to the time the man was covered. The last street the car crossed was Addison. The street ahead of that is Lowell avenue, which is northwest of Addison. There is a high school right on the right side of Milwaukee avenue."

On behalf of the plaintiff Adolph Mitting, husband of the witness Caroline Mitting, testified that he was riding on the right side of the front platform of the car. "I was going northwest. I was the only one besides the motorman. I saw that the car hit the man; he was about five or six feet ahead of the car, and then he arrested; the right side of the car hit him. I did not see him before the car struck him; I saw him just when the car struck him. I was looking north when the car struck him. There was the automobile after another after the man was struck and before. I

saw an automobile coming there about the time the man was struck; I couldn't tell how near to the man it was. I saw an automobile pass after the man was struck. The car that I was on at the time went general speed, about 18 or 20 miles, just before and at the time of the accident; I couldn't say exactly. The speed of the car did not change from the time it left Addison until the man was struck." This witness testified that he was well acquainted with the neighborhood and that it was "very thinly settled." He further testified that the deceased was struck some time after four o'clock in the afternoon, and that the day was clear and bright; that he was a witness at the coroner's inquest, at which time he testified that he saw the man "jumping over the tracks as quick as he could. * * Just running right in front of the car. At that time he was four or five feet in front of the car. The right hand corner of the car caught him."

Charles Schroeder and A. W. Heggie were also called and testified on behalf of the plaintiff. Their testimony as to what occurred at the moment of the accident was substantially the same as that of the two witnesses referred to. Heggie testified that "the car was going, when it reached Addison avenue, I should judge 22 to 25 miles an hour. At the time of the accident it could not be much less, about 18 or 20 miles; just as soon as he put the air brake on it started to go slower. The air brake was put on before the accident. When the motorman saw the man he was, I should judge, about 100 feet, when he turned off the power, and about 75 feet when he put on the air brake, somewheres in there. I saw the man before he was hit. He was on the south track. He was going north crossing Milwaukee avenue north. He was on the south track - the eastbound track. He was going along naturally, and then he stopped. He was facing

saw an automobile coming there about the time the man was struck; I couldn't tell how near to the man it was. I saw an automobile pass after the man was struck. The car that I was on at the time went general speed, about 18 or 20 miles, just before and at the time of the accident; I couldn't say exactly. The speed of the car did not change from the time it left Addison until the man was struck." This witness testified that he was well acquainted with the neighborhood and that it was "very thinly settled." He further testified that the deceased was struck some time after four o'clock in the afternoon, and that the day was clear and bright; that he was a witness at the coroner's inquest, at which time he testified that he saw the man "jumping over the tracks as quick as he could. * * That running right in front of the car. At that time he was four or five feet in front of the car. The right hand corner of the car caught him."

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north when he was walking, then he faced northwest. When I saw him on that track the car was about 200 feet away from him, I should judge. He was walking, and stopped about that time, stopped right in about the middle of the south track. I saw an automobile, it was quite a ways west of him, I should judge three or four hundred feet; it was coming southeast. The car was going northwest. When he stopped, the automobile was about 300 feet from him. The car was about the same distance, I should judge. I noticed him start up again. When he started up again the automobile was just pulling out and was almost by him, just pulling out; when the automobile was coming it had two wheels in the south part of the south or east bound track, and the other two were out towards the curb. That automobile was going pretty fast." This witness also testified that when deceased started to go across the track again the automobile was going by him, that it pulled out towards the curb; that "as soon as the man started to cross the track the motorman sounded the bell. The car was then about 75 or 100 feet from the man."

From the testimony of the plaintiff's own witnesses it is quite clear that deceased had attempted to cross Milwaukee avenue at the point where the accident occurred, and about midway between Lowell avenue and Addison street; that he had ample opportunity to observe whatever vehicles were moving in either direction upon Milwaukee avenue. The day was clear, and there were no obstructions, so far as the evidence shows, which in any way limited his view along the street. From the evidence admitted upon the trial it appears that deceased became aware of the fact that an automobile was approaching at a high rate of speed from the northwest, and that in order to avoid being struck by the automobile the deceased suddenly attempted to cross the north tracks on the street. The wit-

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nesses for the plaintiff all seem to agree that deceased moved quickly and that he was struck by the right corner, that is, the northeast corner of the street car as it was moving on the north tracks in a northwesterly direction. The accident did not happen at a street intersection or crosswalk.

Some of the witnesses for the plaintiff testified that they did not hear any bell sounded or warning of any sort given before the accident happened; other witnesses for the plaintiff testified that a bell was rung and that the motorman of the car made some attempt to stop it before it struck deceased. There is evidence in the record which tends to prove that deceased's senses of sight and hearing were normal.

In Pendleton v. C. C. Ry. Co., 120 Ill. App. 405, it was held that "contributory negligence on the part of a person injured does not relieve the party inflicting the injury from liability, if by the exercise of ordinary care after discovering the danger (to the person injured) the accident could have been prevented, in other words, if the party has been guilty of wilful and wanton conduct; or if such party has been thus guilty in failing to discover the danger through recklessness or carelessness when the exercise of ordinary care would have discovered the danger and averted the calamity." The principle enunciated in this authority is supported by Swanson v. C. C. Ry. Co., 242 Ill. 386, and Chicago & West Division Ry. Co. v. Ryan, 131 Ill. 474.

There is evidence in this record from which it may be assumed that the motorman did in fact see the deceased as he stood upon the tracks when the street car was some distance southeast of the place where the accident oc-

reason for the plaintiff will seem to argue that deceased moved quickly and that he was struck by the right corner, that is, the northeast corner of the street car as it was moving on the north tracks in a northwesterly direction. The accident did not happen at a street intersection or crosswalk.

Some of the witnesses for the plaintiff testified that they did not hear any bell sounded or warning of any sort given before the accident happened; other witnesses for the plaintiff testified that a bell was rung and that the motorman of the car made some attempt to stop it before it struck deceased. There is evidence in the record which tends to prove that deceased's senses of sight and hearing were normal.

In Ferndalson v. C. C. Ry. Co., 140 Ill. App. 405, it was held that "contributory negligence on the part of a person injured does not relieve the party inflicting the injury from liability, if by the exercise of ordinary care after discovering the danger (to the person injured) the accident could have been prevented, in other words, if the party has been guilty of willful and wanton conduct; or if such party has been thus guilty in failing to discover the danger through recklessness or carelessness when the exercise of ordinary care would have discovered the danger and averted the calamity." The principle enunciated in this authority is supported by Freeman v. C. R. R. Co., 242 Ill. 388, and Chicago & East Division Ry. Co. v. Green, 131 Ill. 474.

There is evidence in this record from which it may be assumed that the motorman did in fact see the deceased as he stood upon the tracks when the street car was some distance southeast of the place where the accident occurred

curred. We do not believe, however, that this fact in and of itself renders the defendant legally liable for the death of plaintiff's intestate, irrespective of his own contributory negligence. Whatever may be said about the conduct of the motorman, or whether it be said that he was or was not guilty of any negligence at the time the accident happened, there was no evidence taken at the trial from which it could fairly be presumed that the deceased would, under the circumstances existing at and just before the time of the accident, attempt, as one of plaintiff's witnesses put it, to fly across the street in front of the approaching street car. Had this accident occurred at a street intersection or at or near a crosswalk, a somewhat different case would be presented. Under the circumstances, as they were disclosed to the motorman as the car approached the point where deceased had placed himself upon the tracks, the motorman was justified in his evident assumption that the deceased would not recklessly run in front of the moving street car.

In Wabash R. R. Co. v. Speer, 156 Ill. 244, the court said: "It is well settled that where the injury results from the reckless, wilful or wanton act of the defendant, the plaintiff's right to recover will not be defeated by his mere negligence, however great."

In Pendleton v. C. C. Ry. Co., supra, relied upon by counsel for plaintiff, it appears that the gripman on the train which caused the injury to plaintiff in that case "'shouted to appellant, who thereupon threw up his hands, seemed frightened and immediately commenced to retrace his steps,' starting back easterly across the east track."

In Swanson v. C. C. Ry. Co., supra, the evidence disclosed that the conductor of a stalled cable train knew that

curred. We do not believe, however, that this fact in and of itself renders the defendant legally liable for the death of plaintiff's intestate, irrespective of his own contributory negligence. Whatever may be said about the conduct of the motorman, or whether it be said that he was or was not guilty of any negligence at the time the accident happened, there was no evidence taken at the trial from which it could fairly be presumed that the deceased would, under the circumstances existing at and just before the time of the accident, attempt, as one of plaintiff's witnesses put it, to fly across the street in front of the approaching street car. Had this accident occurred at a street intersection or at or near a crosswalk, a somewhat different case would be presented. Under the circumstances, as they were disclosed to the motorman as the car approached the point where deceased had placed himself upon the track, the motorman was justified in his evident assumption that the deceased would not recklessly run in front of the moving street car.

In Graham v. R. R. Co. v. Dwyer, 138 Ill. 244, the court said: "It is well settled that where the injury results from the reckless, willful or wanton act of the defendant, the plaintiff's right to recover will not be defeated by his mere negligence, however great."

In Lundigan v. C. G. Ry. Co., supra, relied upon by counsel for plaintiff, it appears that the fireman on the train which caused the injury to plaintiff in that case "'mounted to appellant, who thereupon threw up his hands, seemed frightened and immediately commenced to retrace his steps,' starting back westerly across the east track."

In Swanson v. C. & E. Ry. Co., supra, the evidence disclosed that the conductor of a stalled cable train knew that

a crowd of young school boys had collected around it, and the court held that it was the duty of the conductor to exercise ordinary care to see that these boys were not injured by the starting of the train.

In the case of Chicago & West Division Ry. Co. v. Ryan, supra, also relied upon by plaintiff, the person injured was an infant not quite 17 months old, so young in fact that it was incapable of exercising care and could not be charged with negligence.

In the case at bar it does not appear that the deceased had placed himself in such position of danger as that the conduct of the motorman on the car which struck him could be held to be a reckless and wanton disregard of the safety of deceased. The automobile which it is claimed was approaching the deceased from the northwest, partly in the southbound tracks, turned out of the tracks and toward the curb on the southeast side of Milwaukee avenue as it passed the place where deceased was standing. The evidence discloses that he could have stood with perfect safety to himself southwest of the northbound track until the street car had passed, but he chose, without any warning to the motorman, to suddenly run in front of the approaching car.

In C. M. & St. P. Ry. Co. v. Halsey, 133 Ill. 248, the court said: "One who, failing to observe due care, blindly walks into a danger that the observance of due care would have enabled him to avoid, is no less guilty of contributory negligence than he who, by the observance of due care could extricate himself from the danger."

There is really no dispute as to the facts of this case. Heggie, the only witness who seems to have seen the deceased from the moment when he attempted to cross the

a crowd of young school boys had collected around it, and the court held that it was the duty of the conductor to exercise ordinary care to see that these boys were not injured by the starting of the train.

In the case of Chicago & East Division Ry. Co. v. Ryan, supra, also relied upon by plaintiff, the person injured was an infant not quite 17 months old, so young in fact that it was incapable of exercising care and could not be charged with negligence.

In the case at bar it does not appear that the deceased had placed himself in such position of danger as that the conduct of the motorman on the car which struck him could be held to be a reckless and wanton disregard of the safety of deceased. The automobile which it is claimed was approaching the deceased from the northwest, partly in the southbound tracks, turned out of the tracks and passed the curb on the southeast side of Kilbourne avenue as it passed the place where deceased was standing. The evidence disclosed that he could have placed with perfect safety to himself south-west of the northbound track until the street car had passed, but he chose, without any warning to the motorman, to suddenly run in front of the approaching car.

In C. B. & Q. R. R. Co. v. Maloney, 133 Ill. 248, the court said: "One who, failing to observe due care, blindly walks into a danger that the observance of ordinary care would have enabled him to avoid, is no less guilty of contributory negligence than he who, by the observance of due care, could extricate himself from the danger."

There is really no dispute as to the facts of this case. Reggie, the only witness who seems to have seen the deceased from the moment when he attempted to cross the

northbound tracks, testified that deceased started to go across the tracks when the automobile had just about passed him, the street car being then about 100 or 125 feet away from him; that deceased then started walking north, facing in that direction, but that he had previously been facing west, and that he was struck when he was just about at the north rail of the westbound track; that as soon as he started to cross the track the motorman started to sound the gong, the car then being 75 or 100 feet away from deceased; that from the time that he, the witness, realized that deceased was in danger the motorman was very busy "doing everything that he could to stop that car from the moment that the man appeared to be in danger."

The case of Roberts v. C. C. Ry. Co., 262 Ill. 228, is in its effect and in principle much like the case at bar. In deciding this case the court said:

> "The evidence, in the light most favorable to the plaintiff, with all the inferences that could be legitimately drawn from it, did not tend to prove any fault or neglect on the part of the defendant or the exercise of ordinary care on the part of Smith. The question whether Smith exercised ordinary care is to be determined, not by the probabilities when he left the sidewalk, but rather by the situation when he reached the tracks and attempted to cross between the approaching cars when the street was clear and there was no obstruction to the view and no necessity for making the attempt. The evidence established that Smith misjudged his ability to cross the two tracks between the approaching cars, and on account of his error of judgment, for which no one else could be held responsible, he lost his life. Smith could see both cars and the entire situation was open before him. He was not on any crossing for pedestrians and needed no warning or signal that the two cars were approaching each other, - a fact that no one could fail to observe. The evidence raised no issue of fact proper to be submitted to a jury, and the court erred in not directing the verdict."

We are of the opinion that the deceased attempted to cross the tracks in front of the approaching street car when it was too close to him to permit him to do so with safety to himself. It is conceded that the day was clear;

northbound tracks, testified that deceased started to go across the tracks when the automobile had just about passed him, the street car being then about 100 or 150 feet away from him; that deceased then started walking north, facing in that direction, but that he had previously been facing west, and that he was struck when he was just about at the north rail of the westbound track; that as soon as he started to cross the track the motorman started to sound the gong, the car then being 75 or 100 feet away from deceased; that from the time that he, the witness, realized that deceased was in danger the motorman was very busy "doing everything that he could to stop that car from the moment that the man appeared to be in danger."

The case of Roberts v. U. C. Ry. Co., 296 Ill. 322, is in its effect and in principle much like the case at bar. In deciding this case the court said:

> "The evidence, in the light most favorable to the plaintiff, with all the inferences that could be legitimately drawn from it, did not tend to prove any fault or neglect on the part of the defendant or the exercise of ordinary care on the part of deceased. The question whether deceased exercised ordinary care is to be determined, not by the probabilities when he left the sidewalk, but rather by the situation when he reached the tracks and attempted to cross between the approaching cars when the street was clear and there was no obstruction to the view and no necessity for making the attempt. The evidence established that deceased misjudged his ability to cross the two tracks between the approaching cars, and on account of his error of judgment, for which no one else could be held responsible, he lost his life. Death could not but have come to the entire situation was open before him. He was not on his crossing for conversation and needed no warning as against that the two cars were approaching each other, - a fact that no one could fail to observe. The evidence showed no fault of the defendant, which was proper to be submitted to a jury, and the court erred in not directing the verdict."

In one of the opinion that the deceased attempted to cross the tracks in front of the approaching street car when it was too close to him to permit him to do so with safety to himself. It is conceded that the day was clear;

that the deceased was an adult, 33 years of age; that his senses of sight and hearing were good, that there was no obstruction to his view, and nothing of any nature intervened to prevent him from protecting himself by the exercise of very slight care.

It is without doubt true, as insisted and as held in C. C. Ry. Co. v. Sandusky, 198 Ill. 400, that "attempting to cross the track of a street railway ahead of a moving car is not necessarily to be imputed as contributory negligence. It may or may not be prudent, depending upon the proximity of the car and the speed with which it is moving."

The deceased stepped in front of the car of defendant at a time when ordinary prudence should have warned him that death or injury was almost certain to result from his act, and that being the case he must be held to have been guilty of negligence which proximately contributed to his death.

In dediding the case of South Chicago City Ry. Co. v. Kinmare, 96 Ill. App. 210, the court said:

> "If a person is seen upon the tracks, or near thereto, and is apparently capable of taking care of himself, while the motorman should give warning by sounding his gong, having done so, he may assume that such person will leave the track before the car reaches him, so long as the danger of injuring him does not become imminent, and no longer, but this presumption can not be indulged in with reference to children too young to appreciate the danger, nor with regard to those who appear to be in a peril from which they are unable to extricate themselves."

It is insisted by defendant that the evidence admitted on the trial does not tend to prove that the defendant was guilty of any negligence which caused the death of deceased. It is unnecessary for us to pass upon this question for the reason that we are of the opinion that the deceased was guilty of such contributory negli-

that the deceased was an adult, in years of age; that his sense of sight and hearing were good, that there was no obstruction to his view, and nothing of any nature intervened to prevent him from protecting himself by the exercise of very slight care.

It is without doubt true, as contended and as held in G. H. Ry. Co. v. Goudeaux, 195 Ill. 4[illegible], that "attempting to cross the track of a street railway ahead of a moving car is not necessarily to be imputed as contributory negligence. It may or may not be proper, depending upon the proximity of the car and the speed with which it is moving."

The deceased stepped in front of the car of defendant at a time when, ordinary diligence should have warned him that death or injury was at not certain to result from his act, and that bring the case is must be held to have been guilty of negligence which proximately contributed to his death.

In dwelling the case of South Chicago City Ry. Co. v. Hinerny, 94 Ill. App. 4[illegible], the court said:

> "If a person is seen upon the track, or near it, or is apparently on the point of leaving the track himself, while the motorman would live warning by sounding his gong, having done so, or may assume that such person will leave the track before the car reaches him, so long as the chance of injuring him seems to be some longer, and no longer, but this presumption can not be indulged in with reference to motorman who seems to anticipate the danger, or who ought to be in a mental state which he would be in if he had kept which should be within his ability to ascertain."

It is insisted by defendant that the evidence admitted on the trial does not tend to show that the defendant was guilty of any negligence which caused the death of deceased. It is unnecessary to discuss this question for the reason that we are of the opinion that the deceased was guilty of such contributory negli-

gence as precludes plaintiff from recovering a judgment against the defendant in this suit.

The court admitted in evidence at the trial the verdict of a coroner's jury returned in an inquisition taken for the people of the state of Illinois on view of the body of the deceased, but in doing so it excluded from the jury that part of the coroner's verdict which is as follows: "The jury finds this accident could have been avoided had the motorman exercised greater care." The ruling of the trial court on this question was correct. The language of the excluded part of the verdict indicates an attempt on the part of the coroner's jury to fix a civil liability, and this under the law it had no power to do. The language referred to was properly regarded as surplusage, and the court rightfully excluded it from the jury.

> "It is not within the province of the coroner's jury to fix the civil liability of anyone growing out of an accident resulting in the death of an injured person, except in so far as the finding required by the statute to be made may have such effect. It was not proper for the jury empaneled at this inquest to inquire whether the street railway company or anyone else was legally liable to respond in damages because of the death of Samuel Novitsky. The finding in the verdict that, from the evidence introduced, had the street railway company not blockaded the tracks with cars on both sides of the street crossing the accident would not have occurred and deceased would not have lost his life, and the censure of the street railway company, are mere surplusage, and it was not proper to admit the verdict in evidence with those portions included." Novitsky v. Knickerbocker Ice Co., 276 Ill. 102, 108 (advance sheets January 10,1917).

The judgment of the Circuit Court of Cook County will be affirmed.

AFFIRMED.

hence an precludes plaintiff from recovering a judgment against the defendant in this suit.

The court admitted in evidence at the trial the verdict of a coroner's jury returned in an investigation taken for the people of the state of Illinois on view of the body of the deceased, but in doing so it excluded from the jury that part of the coroner's verdict which is as follows: "The jury finds that [illegible] been killed by the [illegible] excessive force." The ruling of the trial court on this question was correct. The language of the excluded part of the verdict indicates an attempt on the part of the coroner's jury to fix a civil liability, and this under the law it had no power to do. The language referred to was improperly admitted as a [illegible], and the court properly excluded it from the jury.

"It is not within the province of the coroner's jury to fix the civil liability of persons [illegible] at an accident resulting in the death of a [illegible], except in so far as it [illegible] to the criminal [illegible] it be made by [illegible]. [illegible] the jury [illegible] street railway company or [illegible] so responsible in damages [illegible] of the death of [illegible] novitiate. The finding in the [illegible] that the evidence [illegible] blockaded the [illegible] street crossing [illegible] street crossing would [illegible] the street railway [illegible] was not proper [illegible] those rules [illegible]. [illegible] 176 Ill. 1 [illegible]

The judgment of the circuit court is affirmed.

County will be [illegible].

[illegible]

161 - 22587

ARTHUR WAGNER COMPANY, a corporation, Defendant in Error, vs. GALLAHER & SPECK, a corporation, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

204 I.A. 206

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Plaintiff left with defendant a Bullock generator and a switchboard for the same, for storage for a stated period of four months at an agreed compensation of $10. The contract is in writing and contains this provision: "You are to allow no person to remove apparatus or parts from same without written permission from ourselves" - the plaintiff. The apparatus was removed bodily with the consent of defendant but without any order, written or verbal, from plaintiff or any of its officers. The apparatus was thereby lost to plaintiff. The cause was tried before the court by agreement of the parties and a finding and judgment in favor of plaintiff for $600 resulted, and defendant sues out this writ of error and asks a reversal.

The relation of the parties to each other was that of bailor and bailee, and the law of bailments governs the rights and liabilities of the parties. It is contended that the contract was ultra vires the chartered powers of defendant. With this contention we do not agree. We think it may be fairly said that the contract of plaintiff, if not within any express right conferred by its charter, was nevertheless incident to the powers expressly granted. The reasoning in Chicago Building Society v. Crowell, 65 Ill. 453, is pertinent to the facts in this record.

ARTHUR WADKINS COMPANY,
a corporation,
Defendant in Error,

vs.

GALLAHER & SHECK, a
corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Plaintiff left with defendant a Delcook generator and a switchboard for the same, for storage for a stated period of four months at an agreed compensation of $10. The contract is in writing and contains this provision: "You are to allow no person to remove apparatus or parts from same without written permission from ourselves" - the plaintiff. The apparatus was removed bodily with the consent of defendant but without any order, written or verbal, from plaintiff or any of its officers. The apparatus was thereby lost to plaintiff. The cause was tried before the court by agreement of the parties and a finding and judgment in favor of plaintiff for $800 resulted, and defendant sues out this writ of error and asks a reversal.

The relation of the parties to each other was that of bailor and bailee, and the law of bailments governs the rights and liabilities of the parties. It is contended that the contract was ultra vires the charered powers of defendant. With this contention we do not agree. We think it may be fairly said that the contract of plaintiff, if not within any express right conferred by its charter, was nevertheless incident to the powers expressly granted. The reasoning in Chicago Building Society v. Crowell, 55 Ill. 455, is pertinent to the facts in this record.

The action is in tort, and under the ruling in Chicago General Ry. Co. v. Chicago City Ry. Co., 87 Ill. App. 17, the defense of ultra vires is not open to defendant. In passing upon this question the court said:

> "There are also numerous cases that corporations can not shield themselves for a tort committed in the prosecution of their business by a claim that the acts were ultra vires. The doctrine of ultra vires has no application in such cases and affords no defense."

As this cause must be again tried, we do not pass upon the weight of the evidence.

There is a vital defect in plaintiff's statement of claim and the proofs given in support thereof. It is averred in the statement as follows:

> "Plaintiff further avers that by reason of negligence, carelessness and misdelivery by the defendant, the generator has become wholly lost to plaintiff, and that the fair, reasonable market value was and is of an amount not less than $600, wherefore plaintiff prays judgment in the sum of $600."

The difficulty with this averment is patent. It fails to state any value of the lost property. A statement that the fair, reasonable market value was and is of an amount not less than $600 does not state any value. While this might have been a sufficient statement of value to support a pleading, if evidence of it were in the record, there being no evidence of value and the averment in the statement of claim fixing none, there was no basis upon which the court could find the value of the property. Had plaintiff averred the value of the property in its statement of claim and had such averment remained undenied by defendant, it would not have been necessary to have proffered evidence to support the averment, as, if it was undenied it would, under rule 19 of the Municipal Court, which appears in the record, have stood as an admitted fact. Leonard v. U. P. R. Co., 180 Ill. App. 415.

The motion is in type, and under the ruling in Chicago General Ry. Co. v. Chicago City Ry. Co., 87 Ill. App. 17, the defense of ultra vires is not open to defendant.

In passing upon this question the court said:

> "There are also numerous cases that corporations can not shield themselves for a tort committed in the prosecution of their business by a claim that the acts were ultra vires. The doctrine of ultra vires has no application in such cases and affords no defense."

As this cause must be again tried, we do not pass upon the weight of the evidence.

There is a vital defect in plaintiff's statement of claim and the proofs given in support thereof. It is averred in the statement as follows:

> "Plaintiff further avers that by reason of negligence, carelessness and misdelivery by the defendant, the generator has become wholly lost to plaintiff, and that the fair, reasonable market value was and is of an amount not less than $600, therefore plaintiff prays judgment in the sum of $600."

The difficulty with this averment is patent. It fails to state any value of the lost property. A statement that the fair, reasonable market value was and is of an amount not less than $600 does not state any value. While this might have been a sufficient statement of value to support a pleading, if evidence of it were in the record, there being no evidence of value and the averment in the statement of claim fixing none, there was no basis upon which the court could find the value of the property. And plaintiff averred the value of the property in its statement of claim and had such averment remained undeclared by defendant, it would not have been necessary to have proffered evidence to support the averment, as, if it was undeclared it would, under rule 19 of the municipal court, which appears in the record, have stood as an admitted fact. Leonard v. C. A. R. Co., 180 Ill. App. 415.

As there is nothing in the pleadings or proofs of plaintiff establishing the value of the property, the subject-matter of the suit, the judgment of the Municipal Court is reversed and the cause is remanded to that court for a new trial.

REVERSED AND REMANDED.

As there is nothing in the pleadings or proofs of plaintiff establishing the value of the property, the subject-matter of the suit, the judgment of the municipal court is reversed and the cause is remanded to that court for a new trial.

REVERSED AND REMANDED.

208 - 22636

BARNEY VARNEY,
Appellee,

vs.

AJAX FORGE COMPANY,
Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

204 I.A. 208

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant prosecutes this appeal in an effort to reverse a judgment of $10,000 entered upon the verdict of a jury as compensation for personal injuries suffered by plaintiff while in the employ of defendant and engaged in his usual duties as such employee.

No question of contributory negligence, fellow servant, or assumed risk is here involved. The action is brought under the Workmen's Compensation Act in force May 1, 1912, and plaintiff relies on the exception clause of Sec. 3 of the Act to maintain the suit.

The declaration consists of one count and charges inter alia that the planer upon which plaintiff was injured was a dangerous machine; that it was practicable and feasible to guard, fence and safeguard it; that certain elective officers of defendant well knew of the unprotected and unfenced condition and that it was practicable and feasible to fence and protect it, and also knew of the danger to plaintiff by reason of its unprotected condition, and charged that defendant's elective officers intentionally omitted to safeguard, protect, and fence the planer.

Defendant interposed to this declaration the plea of the general issue and two special pleas setting forthfacts precluding the common law right of action, averring that both parties were within the "Compensation Act", and negativing any

BARNEY VARNEY, Appellee,	}	APPEAL FROM THE CIRCUIT COURT
vs.	}	OF COOK COUNTY.
AJAX WORK COMPANY, Appellant.	}	

204 I.A.208

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant prosecutes this appeal in an effort to reverse a judgment of $10,000 entered upon the verdict of a jury as compensation for personal injuries suffered by plaintiff while in the employ of defendant and engaged in his usual duties as such employee.

To question of contributory negligence, fellow servant, or assumed risk is here involved. The action is brought under the Workmen's Compensation Act in force May 1, 1912, and plaintiff relies on the exception clause of Sec. 5 of the Act to maintain the suit.

The declaration consists of one count and charges inter alia that the planer upon which plaintiff was injured was a dangerous machine; that it was practicable and feasible to guard, fence and safeguard it; that certain elective officers of defendant well knew of the unprotected and unfenced condition and that it was practicable and feasible to fence and protect it, and also knew of the danger to plaintiff by reason of its unprotected condition, and charged that defendant's elective officers intentionally omitted to safeguard, protect, and fence the planer.

Defendant interposed to the declaration the plea of the general issue and two special pleas setting forth facts precluding the common law right of action, averring that both parties were within the "Compensation Act", and negativing any

intentional omission on the part of any elective officer to guard the planer, etc. To these special pleas plaintiff demurred generally. The demurrer was on a hearing overruled; plaintiff took leave to reply double to the special pleas, but instead of doing so filed a replication in the nature of a similiter to the two special pleas. These pleas did not conclude to the country, but with a verification. The replications filed were not responsive in any way to the pleas and joined no issue thereon. Defendant now urges this error as ground for reversal, but it comes too late to avail of the objection. While in the unsettled condition of the issue on these pleas defendant could not against its objection have been forced to trial and might have moved for a judgment upon these special pleas, as one plea stating a good defense to the whole declaration is, without a replication, tantamount to a confession of the verity of the matters pleaded in defense entitling a defendant to a judgment on such plea; still, in going to trial without objection or the making of any such motion, the subsequent verdict cured this irregularity in procedure. Ferguson v. White Oak Coal Co., Gen. No. 23470 in this court, not yet reported; Ward v. Stout, 32 Ill. 399; Wende v. Chicago City Ry. Co., 271 ibid 437; Lowenstein v. Franklin Life Insurance Co., 122 Ill. App. 632; Miles v. Danforth, 37 Ill. 157; Bissell v. City of Kankakee, 64 ibid 249; People v. Opera House Company, 249 ibid 106; People v. Bug, etc., 189 ibid 55; Adams v. Bruner, 152 Ill. App. 123; LaMonte v. Kent, 163 ibid 1. An objection to the pleadings cannot for the first time be advantaged of on appeal. Defendant by going to trial on the pleadings as they were, without objection, waives the patent irregularity. Sargent v. Baublis, 215 Ill. 428; Adams v. Crown Coal & Tow Co., 198 ibid 445. In First National Bank v.

intentional omission on the part of any elective officer to guard the plaster, etc. To these special pleas plaintiff demurred generally. The demurrer was on a hearing overruled; plaintiff took leave to reply double to the special pleas, but instead of doing so filed a replication in the nature of a rejoinder to the two special pleas. These pleas did not conclude to the country, but with a verification. The replications filed were not responsive in any way to the pleas and joined no issue thereon. Defendant now urges this error as ground for reversal, but it comes too late to avail of the objection. While in the unsettled condition of the issue on those pleas defendant could not against its objection have been forced to trial and might have moved for a judgment upon these special pleas, as one plea stating a good defense to the whole declaration is, without a replication, tantamount to a confession of the validity of the matters pleaded in defense entitling a defendant to a judgment on such plea; still, in going to trial without objection or the making of any such motion, the subsequent verdict cured this irregularity in procedure. Terrell v. White Oak Coal Co., Gen. No. 22470 in this court, not yet reported; Ward v. Stout, 32 Ill. 399; Wende v. Chicago City Ry. Co., 221 Ill 427; Lowenstein v. Franklin Life Insurance Co., 122 Ill. App. 632; Milne v. Fourforth, 37 Ill. 157; Hassell v. City of Kankakee, 64 Ill. App. 249; Ferris v. Lyons House Company, 249 Ill 100; Ensign v. Hay, etc., 109 Ill 55; Adams v. Brewer, 152 Ill. App. 123; Lamonte v. Kent, 105 Ill 1. In objection to the pleading counsel for the first time be advantaged of on appeal. Defendant by going to trial on the issues as they were, without objection, waives the patent irregularity. Garrett v. Hardie, 219 Ill. 452; Lucas v. Crown Coal & Tow Co., 198 Ill 448. In First National Bank v.

Miller, 235 Ill. 135, it was held that "the law is settled that if parties go on with the trial without formally joining issue, this irregularity is waived after verdict."

Plaintiff sustained the injury complained about while working on a planer in defendant's factory. He was caught between a projecting screw called a "dog" and a shifting lever on the moving bed of the planer, and his injuries were of such a serious nature that he suffered an amputation of his left leg near the hip.

It is not disputed that plaintiff suffered the injury set out in his declaration, or that the injury happened to him while he was working about his ordinary duties as the servant of defendant, in the course of his ordinary and usual employment. Nor is it complained that the amount of the recovery is excessive. Defendant denies its liability in toto and argues first, that it did not violate the dangerous machinery and safety appliance act, which requires dangerous power driven machinery to be guarded; second, that there was no intentional omission in not sufficiently guarding the "dog" to which the injury is primarily attributable; and, third, that the duty enjoined by the act was not intentionally violated by any elective officer of defendant.

Section 1 of an Act in force January 1, 1910, entitled "Health and Safety of Employees," being part of Chap. 48, R. S., provides that all power driven machinery, including all screws, planes, projecting set screws or moving parts shall be so located wherever possible as not to be dangerous to employees, or shall be properly enclosed, fenced or otherwise protected. Section 3 of the Workmen's Compensation Act in force May 1, 1912, after restricting the right of action and recovery to the methods and amounts provided in the act, contains this exception:

Miller, 285 Ill. 153, it was held that "the law is settled that if parties go on with the trial without formally joining issue, this irregularity is waived after verdict."

Plaintiff sustained the injury complained about while working on a planer in defendant's factory. He was caught between a protecting screw called a "dog" and a shifting lever on the moving bed of the planer, and his injuries were of such a serious nature that he suffered an amputation of his left leg near the hip.

It is not disputed that plaintiff suffered the injury set out in his declaration, or that the injury happened to him while he was working about his ordinary duties as the servant of defendant, in the course of his ordinary and usual employment. Nor is it complained that the amount of the recovery is excessive. Defendant denies its liability in toto and argues first, that it did not violate any dangerous machinery and safety appliance act, which requires dangerous power driven machinery to be guarded; second, that there was no intentional omission to not so fully guard the "dog" to which the injury is reasonably attributable; and, third, that the duty enjoined by the act was not intentionally violated by any elective officer of defendant.

Section 1 of an act in force January 1, 1911, entitled "Health and safety of employees," being par. [illegible] of ch. 48, R. S., provides that all power driven machinery, including all screws, pinions, projecting set screws or revolving [illegible] shall be so located or fenced [illegible] as not to be dangerous to employees, or shall be properly guarded, fenced or otherwise protected. Section 3 of the [illegible] act in force July 1, 1912, after restricting the [illegible] of section and recovery to the methods and amounts provided in the act, contains this exception:

"Provided, that when the injury to the employe' was caused by the intentional omission of the employer to comply with statutory safety regulations, nothing in this Act shall affect the civil liability of the employer. If the employer is a partnership, such omission must be that of one of the partners thereof, and if a corporation, that of any elective officer thereof."

Upon the effect to be given this exception in the act and its application to the facts regarding the omission to protect the "dog" on the planer being attributable to wilfulness upon the part of any of defendant's elective officers, rests the right of plaintiff to sustain the judgment before us for review. It is contended with much force and some logic that the "dog" on the planer was not dangerous within the meaning and intent of the safety appliance act, and that in the operation of the planers in defendant's factory no such or like accident had ever before occurred; that defendant had taken every precaution to guard against accidents from machinery in its factory, and to that end had engaged the services of a competent and expert mechanic, well informed regarding safety appliances for dangerous machinery, who, after a careful examination of defendant's planers did not suggest any safety protective device or devices for the "dogs" with which they were operated.

We think the facts that the serious injury to plaintiff was inflicted by this mechanical device appertenant to the planer, referred to as a "dog", and that soon after the accident, on diligent search and inquiry, defendant discovered and applied to the planers in its factory an efficient method of protection, so that the "dogs" became harmless and the planers with the "dogs" thereon could be safely operated, stamp the appliance as dangerous. The evidence not only demonstrates that the unprotected "dog" on the planer created a condition of danger to the operator, but that steel shavings upon the floor made it slippery

> "Provided, that when the injury to the employe' was caused by the intentional omission of the employer to comply with statutory safety regulations, meaning in this Act shall affect the civil liability of the employer. If the employer is a partnership, such omission must be that of one of the partners thereof, and if a corporation, that of any elective officer thereof."

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We think the facts that the serious injury to plaintiff was inflicted by this mechanical device appurtenant to the planer, referred to as a "dog", and that soon after the accident, on diligent search and inquiry, defendant discovered and applied to the planers in its factory an efficient method of protection, so that the "dogs" became harmless and the planers with the "dogs" thereon could be safely operated, clamp the applicant no dangerous. The evidence not only demonstrates that the unprotected "dog" on the planer created a condition of danger to the operator, but that steel shavings upon the floor made it slippery

and intensified the danger to the operator by making his footing insecure. The bed of the planer, the evidence shows, moved back and forth on a 12 inch stroke, making from 25 to 40 strokes a minute, and was driven with tremendous force. The "dog" or screw was fastened on the side of the planer and moved with it to the shifter level with force sufficient to press steel plates against the cutting knives of the planer. It is plain that the operation of the planer with the "dog" unprotected was fraught with danger to the operator if for any reason he failed to escape the "dog" when it came in contact with the shifter lever.

It is also insisted that the State delegated to its factory inspector the power to enforce the provisions of the dangerous machinery act, with authority to inspect plants and to give notice of violations to owners and to prosecute them for any violation of the act. While the powers and duties of the factory inspector may be as broad as claimed, that would not relieve defendant from the duty which the act in question imposes upon the factory owner. In Streeter v. Western Scraper Company, 254 Ill. 244, it was held that the safety appliance act in question imposed the duty absolutely upon the owner to protect dangerous machinery and that a failure to do so could not be excused by the failure of the factory inspector to give notice to the owner. The duty rested upon the owner and was not dependent upon receipt of notice from the factory inspector.

There is evidence that several of the elective officers of defendant were advised as to the requirements of the safety appliance act and the duties devolving upon owners thereunder to protect dangerous machinery. Can it be said that with such knowledge of statutory responsibility and with the further knowledge, fairly imputable to defendant from the evidence, that the "dog" on the planer was dangerous to an

and intensified the danger to the operator by making his footing insecure. The top of the planer, the evidence shows, moved back and forth on a 12 inch stroke, moving from 25 to 40 strokes a minute, and was driven with tremendous force. The "dog" or screw was fastened on the side of the planer and moved with it to the shifter lever with force sufficient to press steel plates against the cutting knives of the planer. It is plain that the operation of the planer with the "dog" unprotected was fraught with danger to the operator if for any reason he failed to escape the "dog" when it came in contact with the shifter lever.

It is also indicated that the state delegated to its factory inspector the power to enforce the provisions of the dangerous machinery act, with authority to inspect plants and to give notice of violations to a mere and to prosecute them for any violation of the act. While the powers and duties of the factory inspector may be as broad as claimed, that would not relieve defendant from the duty which the act in question imposes upon the factory owner. In Schweter v. Western Oregon Lumber Co., 58 Or. 244, it was held that the safety appliance act in question imposed the duty absolutely upon the owner to protect dangerous machinery and that a failure to do so could not be excused by the failure of the factory inspector to give notice to the owner. The duty rested upon the owner and was not dependent upon receipt of notice from the factory inspector.

There is evidence that several of the objective officers of defendant were advised as to the requirements of the safety appliance act and the duties devolving upon owners thereunder to protect dangerous machinery. Can it be said that with such knowledge of statutory responsibility and with the further knowledge, fairly imputable to defendant from the evidence, that the "dog" on the planer was dangerous to an

operator when unprotected, and that defendant had failed to remedy such condition by complying with the act and suitably protecting the point of danger, will the law not say that such omission of the duty cast upon such officers by the statute was intentional? It seems to us that it must. Intent must be gathered from all the circumstances shown by the evidence. What such evidence proves is for the jury, and as said in Burnes v. Swift, 186 Ill. App. 460: "Circumstances surrounding a transaction might be of such a character as to warrant a jury in finding an intentional omission." In Odin v. Denman, 84 ibid 190, the court say: "Willfulness is as difficult to define as negligence. When a violation of the statute is established, then whether it is a willful violation must be determined by the jury, from all the facts and circumstances of the particular case." Aetitus v. Spring Valley Coal Co., 246 Ill. 33. There is ample evidence in this record sustaining the verdict of the jury, which inferentially found that some elective officer of defendant intentionally omitted to have the "dog" on the planer, the proximate cause of the plaintiff's injuries, protected with a suitable safety appliance.

Defendant criticises some of the instructions to the jury. We think the jury, taking the instructions given as an entirety, was sufficiently and correctly instructed on every essential legal element in the cause. Setting forth in an instruction the language of the statute involved, while discountenanced in some decisions, has not been held reversible error. In the early case of Wox v. Town of Kendall, 97 Ill. 72, such method of instruction was approved. Kellyville Coal Co. v. Strine, 217 ibid 516, is a concurring authority. While in Wing v. Smith, 190 Ill. App. 275, the court did not entirely approve reciting the statute in an

operator when unprotected, and that defendant had failed to remedy such condition by complying with the act and suitably protecting the point of danger, will the law not say that such omission of the duty cast upon such officers by the statute was intentional? It seems to us that it must. Intent must be gathered from all the circumstances shown by the evidence. That such evidence proves is for the jury, and as said in Dunne v. Swift, 168 Ill. App. 460: "Circumstances surrounding a transaction might be of such a character as to warrant a jury in finding an intentional omission." In Odin v. Donnan, 84 Ind 190, the court say: "Willfulness is no difficult to define as negligence. When a violation of the statute is established, then whether it is a willful violation must be determined by the jury, from all the facts and circumstances of the particular case." Jenkins v. Spring Valley Coal Co., 246 Ill. 34. There is ample evidence in this record sustaining the verdict of the jury, which intermediately found that some directive officer of defendant intentionally omitted to have the "dog" on the pinion, the proximate cause of the plaintiff's injuries, protected with a suitable safety appliance.

Defendant criticises some of the instructions to the jury. We think the jury, taking the instructions given as an entirety, was sufficiently and correctly instructed on every essential legal element in the cause. Setting forth in an instruction the language of the statute involved, with the interpretations of some decisions, has not been held reversible error. In the recently cause of Ryk v. Town of Kendall, 87 Ill. 72, such method of instruction was approved. Kellyville Coal Co. v. Stetine, 217 Ill 210, is a controlling authority. While in Pine v. Smith, 176 Ill. App. 75, the court did not entirely approve reciting the statute in an

instruction, it did hold that doing so did not constitute reversible error.

The complaint that the term "proximate cause" in one of the instructions is not sufficiently defined to aid the unprofessional man to understand its meaning, is without force. Had defendant desired a more lucid definition of the term it might have tendered an instruction embodying its view of such definition.

The judgment of the Circuit Court does justice between the parties, under the law, and it is therefore affirmed.

AFFIRMED.

instruction, it did hold that doing so did not constitute reversible error.

The complaint that the term 'proximate cause' in one of the instructions is not sufficiently defined to aid the unprofessional man to understand its meaning, is without force. Had defendant desired a more lucid definition of the term it might have tendered an instruction embodying its view of such definition.

The judgment of the circuit court does justice between the parties, under the law, and it is therefore affirmed.

AFFIRMED.

215 - 22643

SOPHIA KARCHER,
Defendant in Error,

vs.

JOSEPH F. KARCHER,
Plaintiff in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

204 I.A. 210

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Complainant filed her bill for divorce alleging desertion. She also prayed for alimony and solicitor's fees. Defendant having departed for Santa Cruz in the Republic of Mexico, where he was alleged to and did in fact at that time live, personal service upon him could not be obtained and therefore resort was had to service by publication, as in such case is permitted by the statutes of this State. On such service by publication, defendant not appearing either in person or by counsel, a default was taken against him, and on an ex parte trial a decree was on April 25, 1911, entered of record divorcing the parties, of which decree neither party is at the present time complaining. However, in the divorce decree it was ordered that the question of alimony as prayed for in complainant's bill be "reserved for the future consideration of this court." Defendant subsequently returned to the city of Chicago and evidenced his satisfaction with the decree of divorce obtained by complainant during his absence in Mexico, by taking unto himself a new conjugal partner, which action forever sealed the binding force and effect of the divorce decree. On August 12, 1913, complainant, after notice to defendant and by leave of court, filed her petition for an order on defendant to pay her alimony and solicitor's fees. To this petition defendant entered a special appearance attacking the jurisdiction of

215 - 22643

SONIA XANCHEK, Defendant in Error,	
vs.	ERROR TO SUPERIOR COURT
JOSEPH P. XANCHEK, Plaintiff in Error.	OF COOK COUNTY.

204 I.A. 210

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Complainant filed her bill for divorce alleging desertion. She also prayed for alimony and solicitor's fees. Defendant having departed for Santa Cruz in the Republic of Mexico, where he was alleged to and did in fact at that time live, personal service upon him could not be obtained and therefore resort was had to service by publication, as in such case is permitted by the statutes of this State. On such service by publication, defendant not appearing either in person or by counsel, a default was taken against him, and on an ex parte trial a decree was on April 25, 1911, entered of record divorcing the parties, of which decree neither party is at the present time complaining. However, in the divorce decree it was ordered that the question of alimony as prayed for in complainant's bill be "reserved for the future consideration of this court." Defendant subsequently returned to the city of Chicago and cohabited his relationship with the decree of divorce obtained by complainant during his absence in Mexico, by taking unto himself a new conjugal partner, which action forever sealed the binding force and effect of the divorce decree. In August 12, 1912, complainant, after notice to defendant and by leave of court, filed her petition for an order of defendant to pay her alimony and solicitor's fees. To this petition defendant entered a special appearance attacking the jurisdiction of

the court to entertain the petition. This petition on October 13, 1913, complainant dismissed. On September 15, 1913, complainant, by leave of court, filed an amended petition seeking an order against defendant for alimony and solicitor's fees and obtained an order for a summons against defendant to appear at the October 1913 term of the court and answer, etc., the amended petition. The summons issued and was personally served on defendant by the Sheriff of Cook County, and in answer to such summons defendant entered his special appearance October 7, 1913, and again challenged the jurisdiction of the court to proceed in the matter of awarding alimony and solicitor's fees and moved to dismiss the amended petition for want of jurisdiction. After a hearing of this motion before the Chancellor it was denied on October 28, 1913, and defendant ordered to answer the amended petition within ten days. Defendant answered, to which answer exceptions were filed and partly sustained, whereupon defendant filed an amended answer, to which complainant filed a replication, and the issue as thus joined was heard by the Chancellor and an allowance of $30 a month for permanent alimony was decreed. From this alimony decree defendant prayed but did not perfect an appeal. On defendant's initiative the decree for alimony was reduced from $30 to $22 a month. On September 20, 1916, defendant was ordered to show cause for failure to pay the alimony ordered, and on the 25th day of the same month he sued out of this court this writ of error, which brings before us for review the questions touching the validity of the proceedings culminating in the alimony decree.

There is really but one question of any importance raised or argued by defendant, and that goes to the jurisdiction of the court to enter, after the lapse of the

the court to entertain the petition. This petition on October 15, 1913, complainant dismissed. On December 15, 1913, complainant, by leave of court, filed an amended petition seeking an order against defendant for alimony and solicitor's fees and obtained an order for a a mensa against defendant to appear at the October 1913 term of the court and answer, etc., the amended petition. The summons issued and was personally served on defendant by the sheriff of Cook county, and in answer to such summons defendant entered his special appearance October 7, 1913, and again challenged the jurisdiction of the court to proceed in the matter of awarding alimony and solicitor's fees and moved to dismiss the amended petition for want of jurisdiction. After a hearing of this motion before the chancellor it was denied on October 28, 1913, and defendant ordered to answer the amended petition within ten days. Stipulations extended, to which answer exceptions were filed and certain exceptions, whereupon defendant filed an amended answer, to which complainant filed a replication, and issue joined. Was heard by the chancellor and an allowance of $50 a month for permanent alimony was decreed. From this alimony decree defendant prayed out a writ of error on appeal. On defendant's initiative the decree for alimony was reduced from $50 to $25 a month. On September 1, 1917, defendant was ordered to show cause for failure to pay the alimony ordered, and on the 20th day of the same month he came out of this court with a writ of error. After review the supreme court affirmed the decree touching the validity of the proceedings culminating in the alimony decree.

There is really but one question of any consequence raised or argued by defendant, and that goes to the jurisdiction of the court to enter the decree for alimony.

term at which the decree of divorce was entered, the decree for ~~the~~ alimony which it did.

The jurisdiction of the court to decree alimony is governed by the divorce statute and the decisions of our courts in interpretation of that statute. The decisions in other jurisdictions, where in conflict with the statutes or decisions of our own court, are without force and have no controlling effect. Sec. 18, chap. 40 R. S., title "Divorce," is as follows;

> "When a divorce shall be decreed the court may make such order touching the alimony and maintenance of the wife, the care, custody and support of the children or any of them, as, from the circumstances of the parties and the nature of the case shall be fit, reasonable and just; and in case the wife be complainant, to order the defendant to give reasonable security for such alimony and maintenance, or may enforce the payment of such alimony and maintenance in any other manner consistent with the rules and practice of the court. And the court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance, and the care, custody and support of the children, as shall appear reasonable and proper."

It will be seen by the section of the Divorce Act <u>supra</u> that the court may both at and after the term at which the decree of divorce is entered deal with the subjects of alimony, solicitor's fees and the custody and support of the children of the marriage.

While the Chancellor was without jurisdiction to award alimony in the decree for divorce obtained on service by publication, still that in no way abridged the power of the court to reserve the question of alimony and solicitor's fees until such time as an appropriate motion in the divorce cause, after jurisdiction of the person of defendant might be obtained, to proceed to decree alimony. What was decided on this point in <u>Proctor</u> v. <u>Proctor</u>, 215 Ill. 275, was that a decree for alimony and solicitor's fees could not be sustained where defendant had not been personally served or had

term at which the decree of divorce was entered, the decree for xxx alimony which it did.

The jurisdiction of the court to decree alimony is governed by the divorce statute and the decisions of our courts in interpretation of that statute. The decisions in other jurisdictions, where in conflict with the statutes or decisions of our own court, are without force and have no controlling effect. Leo. 18, chap. 40 R. G., title "Divorce," is as follows;

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not entered his appearance. It therefore has no bearing as an authority in the instant case.

In Lynde v. Lynde, 54 N. J. Equity 473, cited by counsel for defendant, the question was raised as to the want of jurisdiction because the appearance of the defendant had not been entered or personal service or process had on him, and the further fact that the decree did not reserve the right to apply thereafter for alimony when jurisdiction in personam was obtained. In this regard, however, the court admitted an amendment to the decree reserving the question of alimony for the further consideration of the court, which resulted in the allowance of alimony. In a suit afterwards instituted in New York to recover in that jurisdiction the alimony decreed by the New Jersey court, the action of the New Jersey court in allowing the amendment was sustained in force of the due faith and credit clause of the Federal constitution. In Starrett v. Starrett, 132 Ill. App. 315, where the question of the right of the court to order the payment of alimony at a term subsequent to that at which the decree of divorce was entered was in dispute, that question was decided contrary to defendant's contention, the court saying:

> "We are of opinion that the settled practice in this State is otherwise. This bill asked for two branches of relief - a divorce, and an allowance for support and maintenance and for solicitor's fees. The prayer for alimony was incidental to the main relief sought. It was entirely in harmony with recognized equity practice to grant a final decree as to the main question, viz: the divorce, and to retain jurisdiction of the incidental matter of alimony till some later date and term for any reason which seemed to the court to justify that course."

The logical result of defendant's contention, if given judicial effect, would be that in a divorce decree granted on service by publication, no alimony could be allowed in such decree or at any time after the lapse of the

not entered his appearance. It therefore has no bearing as an authority in the instant case.

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The logical result of defendant's contention, if given judicial effect, would be that in a divorce decree granted on service by publication, no alimony could be allowed in such decree or at any time after the date of the

term at which the decree of divorce was entered, regardless of the fact that the divorce decree reserved the consideration of the question of alimony to a subsequent term, so that after the term at which the decree was entered on service by publication, no order could be made regarding alimony, and the complaining wife divorced in this way would be barred from ever recovering alimony. Such is not the statute, and no decision of our Supreme Court can be found holding to any such doctrine.

The allowance of alimony is restricted to the divorce suit and cannot be granted in any other action. Consequently complainant, if entitled to alimony, must obtain its allowance in her divorce suit or not at all.

We cannot see any distinction in the statute limiting the power of the court to reserve the question of the allowance of alimony to causes where jurisdiction of the defendant is obtained by personal service, and the barring of such power in those cases where service of the defendant has been had by publication. When the court by service of process or by entry of appearance secures jurisdiction of the defendant in personam, the court may proceed to adjudicate the right of the wife to alimony and in the usual way to enforce its payment at a term subsequent to that at which the decree of divorce was entered. Not only had defendant in this case been personally served with process in the divorce suit on complainant's petition for alimony, but he had also entered his appearance and after the decree for alimony had been entered he voluntarily appeared and invoked the jurisdiction of the court and procured a reduction of the amount of alimony decreed from $30 to $22 a month. The decree for alimony as modified on the motion of

term at which the decree of divorce was entered, regardless of the fact that the divorce decree reserved the consideration of the question of alimony to a subsequent term, so that after the term at which the decree was entered on service by publication, no order could be made regarding alimony, and the complaining wife divorced in this way would be barred from ever recovering alimony. Such is not the statute, and no decision of our Supreme Court can be found holding to any such doctrine.

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defendant is the decree now in force on this branch of the divorce suit, and we think that he is now estopped from disputing its validity.

The decree of the Superior Court awarding alimony was entered at a time when the court had jurisdiction of the defendant *in personam*, and it is binding upon him and is therefore affirmed.

AFFIRMED.

defendant is the decree now in force on this branch of the divorce suit, and we think that he is now estopped from disputing its validity.

The decree of the Superior Court awarding alimony was entered at a time when the court had jurisdiction of the defendant in personam, and it is binding upon him and is therefore affirmed.

AFFIRMED.

224 - 22655

PORTER, FISHBACK AND COMPANY,
Appellee,

vs.

RALPH L. PECK,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

204 I.A. 211

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The parties to this litigation are landlord and tenant. The suit is for rent and other charges claimed to be due under a written lease between the parties, and relates to office accommodations furnished defendant under that lease. The amount claimed to be due from defendant in plaintiff's statement of claim is $1,044.22. In defendant's affidavit of meritorious defense he claimed that the lease had been procured by fraud and false representations, that the rent claimed had been paid, and by an amended statement of set-off claimed $757.52 for moneys advanced for plaintiff and $975 for legal services performed for plaintiff.

The cause was submitted to the court for trial without a jury, and after hearing the evidence of the parties the trial Judge found that there was due plaintiff from defendant $841.70, and judgment for that amount was entered, from which defendant prosecutes this appeal.

There were many items in dispute, and we are not able to say from the evidence found in the record that the trial Judge did not arrive at a correct conclusion on the disputed evidence as to the amount due from defendant to plaintiff. The testimony is sufficient to support the finding. Defendant does not seriously dispute the accuracy of the finding of the trial Judge from the items which he took into account in arriving at his conclusions, but contends that under the state of the pleadings plaintiff could not

LOTHIN FISHBACK AND COLLAHAN, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
HALLIE L. IRON, Appellant.	

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

The parties to this litigation are landlord and tenant. The suit is for rent and other charges claimed to be due under a written lease between the parties, and relates to office accommodations furnished defendant under that lease. The amount claimed to be due from defendant in plaintiff's statement of claim is $1,044.22. In defendant's affidavit of meritorious defense he claimed that the lease had been procured by fraud and false representations, that the rent claimed had been paid, and by an amended statement of set-off claimed $757.32 for moneys advanced for plaintiff and $275 for legal services performed for plaintiff.

The cause was submitted to the court for trial without a jury, and after hearing the evidence of the parties the trial judge found that there was due plaintiff from defendant $441.7?, and judgment for that amount was entered, from which defendant prosecutes this appeal.

There were many items in dispute, and we are not able to say from the evidence found in the record that the trial judge did not arrive at a correct conclusion on the disputed evidence as to the amount due from defendant to plaintiff. The testimony is sufficient to support the finding. Defendant does not seriously dispute the accuracy of the finding of the trial judge from the items which he took into account in arriving at his conclusions, but contends that under the state of the pleadings plaintiff could not

challenge defendant's right to set off the sums claimed due for attorney's fees and for money advanced plaintiff, because in its affidavit of merits to the set-off plaintiff did not contend that the amounts claimed could not be set off as against its claim as not arising out of the same transaction; and that the defense that defendant did not advance, upon request of plaintiff, or pay out for its use or benefit, at its request or otherwise, the moneys named and referred to, that he did not perform the services for plaintiff or at its request as claimed, and that plaintiff did not assume or agree to pay to defendant the moneys claimed to have been advanced or for the services claimed to have been rendered did not entitle plaintiff to invoke the rule of law that set-offs to be effective must arise or grow out of the same transactions or contract as involved in plaintiff's cause of action, or that the damages sought to be set off must be liquidated.

The denial that the amount claimed in the set-off was due defendant may be viewed in a dual aspect - one of law and the other of fact. In law, that as the amount of the set-off was not claimed to arise or to grow out of the contract of lease nor the damages sought to be set off liquidated, therefore the amount was not due because it was not in law subject to set-off against plaintiff's claim. In the other view - that of fact - the defense amounted to a denial of the genuineness of the claim or the liability therefor of plaintiff in the event that it should be held that the claim, if valid, could be set off against the claim of plaintiff in suit.

However this may be, under well settled rules of pleading an infirmity in a pleading may be carried back to a preceding pleading, which may be defective or vulnerable

challenge defendant's right to set off the sums claimed due for attorney's fees and for money advanced plaintiff, because in its affidavit of merits to the set-off plaintiff did not contend that the amounts claimed could not be set off as against its claim as arising out of the same transaction; and that the defense that defendant did not advance, upon request of plaintiff, or pay out for its use or benefit, at its request or otherwise, the moneys sued and referred to, that he did not perform the services for plaintiff or at its request as claimed, and that plaintiff did not assume or agree to pay to defendant the moneys claimed to have been advanced or for the services claimed to have been rendered did not entitle plaintiff to invoke the rule of law that set-offs to be effective must arise or grow out of the same transactions or contract as involved in plaintiff's cause of action, or that the damages sought to be set off must be liquidated.

The denial that the sums claimed in the set-off was due defendant may be viewed in a dual aspect - one of law and the other of fact. In law, that is the amount of the set-off was not claimed to arise or to grow out of the contract of lease nor the damages sought to be set off liquidated, therefore the amount was not due because it was not in law subject to set-off against plaintiff's claim. In the other view - that of fact - the defense amounted to a denial of the genuineness of the claim or the liability thereof of plaintiff in the event that it should be held that the claim, if valid, could be set off against the claim of plaintiff in suit.

However this may be, under well settled rules of pleading an infirmity in a pleading may be marshaled such to a preceding pleading, which may be defective or unsatisfactory

to attack. Applying this well settled rule to the instant case, we find on referring to the abstract of the record, which is defendant's pleading in this court, the following as his claim of set-off: "Amended statement of claim filed February 26, 1916. The itemized statement shows moneys advanced in the amount of $757.52 and for legal services performed for said company in a total of $975." This certainly states naught that can be construed as a claim arising out of the contract of lease in suit or as a claim resting in liquidated damages. This claim of set-off presented no issue triable in this suit, and on motion might have been stricken from the files. The action of the court, which in effect held that the claim of set-off presented no triable issue, eliminated that pleading from the cause.

We therefore conclude that plaintiff was entitled to contest defendant's set-off on the ground that it was not germane to the claim of plaintiff or in any way connected with the contract of lease sued upon, and that the set-off was not for damages which were liquidated. Furthermore, we agree with the holding of the trial Judge that defendant's counter claim was not the subject of set-off in this cause.

We think this case comes within the ruling in Ewen v. Wilbor, 208 Ill. 492, that unliquidated damages arising out of contracts or covenants disconnected from the subject matter of the plaintiff's claim, are not proper subjects of set-off under the statute. Hawks v. Lands, 3 Gilm. 227; Sargeant v. Kellogg, 5 ibid, 273.

The judgment of the Municipal Court being free from reversible error is affirmed.

AFFIRMED.

to attack. Applying this well settled rule to the instant case, we find on referring to the abstract of the record, which is defendant's pleading in this court, the following as his claim of set-off: "Amended statement of claim filed February 26, 1916. The itemized statement shows money advanced in the amount of $757.55 and for legal services performed for said company in a total of $978." This certainly states naught that can be construed as a claim arising out of the contract of lease in suit or as a claim resting in liquidated damages. This claim of set-off presented no issue triable in this suit, and on motion might have been stricken from the files. The action of the court, which in effect held that the claim of set-off presented no triable issue, eliminated that pleading from the cause.

We therefore conclude that plaintiff was entitled to contest defendant's set-off on the ground that it was not germane to the claim of plaintiff or in any way connected with the contract of lease sued upon, and that the set-off was not for damages which were liquidated. Furthermore, we agree with the holding of the trial judge that defendant's counter claim was not the subject of set-off in this cause.

We think this case comes within the ruling in Swan v. Kibbor, 208 Ill. 482, that unliquidated damages arising out of contracts or covenants disconnected from the subject matter of the plaintiff's claim, are not proper subjects of set-off under the statute. Jones v. Jones, 3 Ill. App. 227; Hammond v. Hallock, 3 Ill. App. 474.

The judgment of the Municipal Court being free from reversible error is affirmed.

AFFIRMED.

240 - 22674

THE MIDLAND PRESS, a corporation, Appellant,	APPEAL FROM SUPERIOR COURT
vs.	OF COOK COUNTY.
F. E. COMPTON & COMPANY, a corporation, et al., Appellees.	

204 I.A. 216

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The complainant filed its bill against defendants for injunctional relief, basing its right to such relief in virtue of a written contract between complainant and McBride, Miller and Hughes. To this bill a general and special demurrer were interposed and sustained, whereupon complainant took leave to file an amendment to its bill and, in the amendment filed pursuant to such leave, averred that the contract of the parties in dispute rested "partly in writing and partly orally."

To the bill as thus amended the demurrers on file were extended, and on a hearing such demurrers were sustained to the original bill of complainant and the amendment thereto, and complainant electing to stand by its bill as amended, a decree dismissing it for want of equity was entered, from which this appeal was prayed, and we are now asked to reverse that decree.

By the averments of the bill as amended it appears that the contract between the parties set out in complainant's pleading and in virtue of which the rights, obligations and duties of the parties to the contract must be admeasured, expired by efflux of time on January 1st, 1917. The questions arising are therefore in the main moot ques-

240 - 22674

THE MILKWAUKEE LEAGUE, a corporation, Appellant,	)	APPEAL FROM DIVISION COURT
vs.	)	OF COOK COUNTY.
W. H. COLTON & COMPANY, a corporation, et al., Appellees.	)	

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The complainant filed its bill against defendants for injunctional relief, seeking its right to such relief in virtue of a written contract between complainant and McBride, Miller and Hughes. To this bill a general and special demurrer were interposed and sustained, whereupon complainant took leave to file an amendment to its bill and, in the amendment filed pursuant to such leave, averred that the contract of the parties in dispute rested "partly in writing and partly orally."

To the bill as thus amended the demurrers on file were extended, and on a hearing such demurrers were sustained to the original bill of complainant and the amendment thereto, and complainant electing to stand by its bill as amended, a decree dismissing it for want of equity was entered, from which this appeal was prayed, and we are now asked to reverse that decree.

By the averments of the bill as amended it appears that the contract between the parties was not in complainant's pleading and in view of which the rights, obligations and duties of the parties to the contract must be adjudged, excepted by affidavit of time on January 1st, 1907. The questions arising are therefore in the main mere ques-

tions as to which equity will not grant any relief.

The main provisions of the contract relate to personal service of the defendants McBride and Miller in and about the exploiting of the sale of certain publications anterior to January 1, 1917, and included in the relief prayed is that defendants F. E. Compton & Company and Frank E. Compton be enjoined from inducing McBride, Miller and Hughes to break their contract with complainant. It is therefore patent that had an injunction been granted by the Chancellor on this branch of the case, it would have expired by limitation; and that as the injunction could in no event have extended beyond such limit of time, and that limit having passed, it would be a work of supererogation to direct the trial court to grant an injunction which, in the circumstances of the case, could not be operative as to the instant or any future time. Mammoser v. City of Chicago, 173 Ill. App. 63.

However, complainant also seeks to enjoin defendants from circulating false and fraudulent reports to the effect that one of complainant's publications is an infringement upon the copyright of a publication of the Grolier Society, and that the Society is about to commence legal proceedings against all parties guilty of such infringement, etc.

Taking these averments as true, they constitute, if anything, a trade slander, impugning the title to and the right of complainant to deal in the publication thus attacked. It is well settled that a court of equity will not enjoin the publication of either a slander or a libel, and certainly no relief can be granted in equity by an injunctional proceeding for torts committed in the past.

Everett Piano Co. v. Bent, 60 Ill. App. 372;

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However, complainant also seeks to enjoin defendants from circulating false and fraudulent reports to the effect that one of complainant's publications is an infringement upon the copyright of a publication of the Trifler Society, and that the Society is about to commence legal proceedings against all parties guilty of such infringement, etc.

Taking these averments as true, they constitute, if anything, a trade slander, impugning the title to and the right of complainant to deal in the publication thus attacked. It is well settled that a court of equity will not enjoin the publication of either a slander or a libel, and certainly no relief can be granted in equity by an injunctional proceeding for torts committed in the past.

Everett Piano Co. v. Hunt, 60 Ill. App. 378;

Chicago City Ry. Co. v. General Electric, 74 ibid 465; Francis v. Flinn, 118 U. S. 385; Willis v. O'Connell, 231 Fed. 1004.

The remedy at law for trade slander is adequate; therefore where equitable relief in such circumstances is sought to be invoked, it will be denied. Moreover, in an action of slander the defendant is entitled to a trial by jury - a constitutional right which cannot be denied, even indirectly, by the interposition of a court of equity.

The bill as amended declares inter alia "that the contract was thereupon entered into between complainant and Miller, McBride and Hughes, partly in writing and partly orally," etc. Where a contract is reduced to writing and no fraud or mistake intervenes or is charged, it becomes the contract of the parties, the provisions of which will control their rights, obligations and remedies; and such a contract cannot be varied, changed, detracted from or added to by contemporaneous oral agreement. A contract partly in writing and partly oral is, by legal interpretation, an oral contract. A contract cannot be said to be in writing unless the parties thereto, as well as its terms and provisions, can be ascertained from the contract itself. Conductors' Benefit Association v. Loomis, 142 Ill. 560; Same v. Tucker, 157 ibid 194.

Treating, then, the contract as oral, the statute of frauds inhibits the granting of relief, as it is averred that the duration of the contract was to be two years and four months, while the limitation of time must not, to escape the statute, extend beyond one year. Sec. 1, chap. 59, R. S.

We think the contract is defective for want of mutuality of either remedy or obligation, and that the restrictive covenant as to territory being without limitation is void as against public policy and as being in restraint of trade.

Chicago City Ry. Co. v. General Electric, 74 Ill. 485; Francis v. Flinn, 118 U. S. 385; Willis v. O'Connell, 221 Pa. 1004.

The remedy at law for trade slander is adequate; therefore where equitable relief in such circumstances is sought to be invoked, it will be denied. However, in an action of slander the defendant is entitled to a trial by jury - a constitutional right which cannot be denied, even indirectly, by the interposition of a court of equity.

The bill as amended declares inter alia "that the contract was thereupon entered into between complainant and Miller, Moffile and Hughes, partly in writing and partly orally," etc. Where a contract is reduced to writing and no fraud or mistake intervenes or is charged, it becomes the contract of the parties, the provisions of which will control their rights, obligations and remedies; and such a contract cannot be varied, changed, detracted from or added to by contemporaneous oral agreement. A contract partly in writing and partly oral is, by legal interpretation, an oral contract. A contract cannot be said to be in writing unless the parties thereto, as well as its terms and provisions can be ascertained from the contract itself. Coachmakers' Benefit Association v. Loomis, 142 Ill. 369; Hume v. Tucker, 197 Ill. 104.

Treating, then, the contract as oral, the statute of frauds inhibits the granting of relief, as it is averred that the duration of the contract was to be two years and four months, while the limitation of time must not, to escape the statute, extend beyond one year. Sec. 1, chap. 59, R. S.

We think the contract is defective for want of mutuality of either remedy or obligation, and that the restrictive covenant as to territory being without limitation is void as against public policy and as being in restraint of trade.

Union Strawboard Co. v. Bonfield, 193 Ill. 420; Lanzit v. Sefton Mfg. Co., 184 ibid 326.

The bill as amended was clearly obnoxious to the demurrer interposed, complainant not being entitled to the equitable relief prayed or to any portion of such relief.

The decree of the Superior Court sustaining the demurrer of defendants to the bill of complainant as amended is affirmed.

AFFIRMED.

Union Stockyard Co. v. Mouflard, 105 Ill. 456; Lamkin v. Sorlon Mfg. Co., 184 Ibid 328.

The bill as amended was clearly obnoxious to the demurrer interposed, complainant not being entitled to the equitable relief prayed or to any portion of such relief.

The decree of the Superior Court sustaining the demurrer of defendants to the bill of complainant as amended is affirmed.

AFFIRMED.

364 - 21761

ANNA HILLER,
Plaintiff in Error,

vs.

ADOLPH HOLMAN, et al.,
Defendants in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

204 I.A. 223

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff in error filed a bill against the defendants in error for an accounting and the cancellation of two trust deeds upon certain real estate. The account was stated by the master, his report was approved and a decree entered canceling and removing one of the trust deeds. Complainant asks that the decree be reversed on the ground that both trust deeds should have been ordered delivered up and canceled.

It appears that after the issues were joined the cause was referred to a master in chancery to take proofs and report his conclusions upon the law and the facts. After hearing the evidence, the master made up his report stating the account between the parties, and recommended, inter alia, that the trust deed dated December 31, 1900, given to secure an indebtedness of $2000, be set aside and declared null and void, and that the prayer of the bill be granted. Objections were filed by the defendants to certain items in the account as stated by the master, but no objection was made to the finding and recommendation that said trust deed be declared null and void. The objections were overruled and ordered to stand as excep-

364 - 31701

ANNA MILLER, Plaintiff in error,	
vs.	Error to
ADOLPH HOLMAN, et al., Defendants in error.	CIRCUIT COURT.
	Cook County.

MR. PRESIDING JUSTICE CARTER delivered the opinion of the court.

Plaintiff in error filed a bill against the defendants in error for an accounting and in cancellation of two trust deeds upon certain real estate. The account was stated by the master, his report was approved and a decree entered cancelling and releasing one of the trust deeds. Complainant asks that the decree be reversed on the ground that both trust deeds should have been cancelled delivered up and cancelled.

It appears that Alice [illegible] a [illegible] years [illegible] the owner, returned to a meeting [illegible] people and report his findings upon the law and the facts. After hearing the evidence, the master made up his report stating the amount between the parties, [illegible] index file, that the trust deed should be [illegible] 31, 1909, given to secure an indebtedness of $3000, to [illegible] and designated null and void, and that the [illegible] be released. Objections were filed by [illegible] certain items in the account as stated [illegible], but no objection was made to the finding and recommendation that said trust deed be designated null and void. The objections were overruled and orders to return to escrow-

tions, and without the chancellor's passing upon them, the cause was re-referred to the master with directions to report his conclusions as to specific items in the account. Thereafter the master filed a supplemental report in accordance with the order. The defendants again filed objections as to certain items and on the hearing of the supplemental report before the chancellor, on motion of the defendants, the matter was again re-referred to the master with directions in reference to the statement of certain items in the account. Thereafter the master heard additional evidence and made up a third report. When this report was filed, defendants filed exceptions thereto in reference to certain items allowed by the master, but afterwards, upon notice to the complainant, moved the court that the master's report be approved and a decree entered, which was accordingly done. To the entry of this decree the complainant objected on the ground that the trust deed above mentioned was not ordered canceled.

Counsel for both parties in this court have argued as to the correctness of the master's report in stating the account, and have discussed the merits of the case. None of this argument is proper, as defendants abandoned their exceptions filed to the master's reports and both parties were satisfied with the findings and recommendations of the master. Therefore, the only question before us is, is the decree in accordance with the recommendations of the master? The decree recites that the cause came on for hearing upon the pleadings and the master's report filed November 8, 1911, and the master's report dated August 20, 1912, these being the first and third reports respectively. In the first report,

[illegible]tions, and without the observations pending upon them, the [illegible] was re-referred to the master with directions to re-[illegible]port the conclusions as to specific items in the account. Therefore the master filed a supplemental report [illegible] accordance with the order. The defendants again filed objections as to certain items and on the hearing of the supplemental report before the chancellor, on motion of the defendants, the matter was again re-referred to the master with direction to receive evidence as to the allowance of certain items in the account. The master then heard additional evidence and made a third report. When the matter was finally determined the chancellor made an allowance in certain items claimed by the [illegible], but disallowed, upon exception to the supplemental report, the claim that the [illegible] report is supported by a preponderance of evidence, and [illegible] to the effect of [illegible] exceptions on the ground that the [illegible] report [illegible] unsupported.

[illegible] the [illegible] of the master's report [illegible] the account, and [illegible] the [illegible]. [illegible] in [illegible], the [illegible] exceptions [illegible] both [illegible] matters [illegible] the [illegible] of the master. Therefore, the [illegible] in [illegible] in accordance with the recommendation [illegible] report [illegible] plaintiff's [illegible] report [illegible], and the master's [illegible] [illegible] report.

the master expressly found that the trust deed in question was not an equitable lien upon the premises and recommended that it be set aside and declared null and void. As the decree fails to conform to the recommendations in this regard, it is erroneous. The decree, therefore, in so far as it fails to set aside the trust deed dated December 31, 1900, securing an indebtedness of $2000, is reversed and the cause remanded with directions to enter a decree in accordance with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

the master expressly found that the trust deed in question was not an equitable lien upon the premises and recommended that it be set aside and declared null and void. As the decree fails to conform to the recommendations in this regard, it is erroneous. The decree, therefore, in so far as it fails to set aside the trust deed dated December 31, 1900, securing an indebtedness of $2000, is reversed and the cause remanded with directions to enter a decree in accordance with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

390 - 21788

DANIEL A. LEVY, JOHN F. TYRRELL and WILLIAM H. DEVENISH, doing business as Levy, Tyrrell & Devenish, Defendants in Error, vs. CAROLINE PAYNE, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

204 I.A. 224

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Daniel A. Levy, John F. Tyrrell and William H. Devenish, doing business as Levy, Tyrrell & Devenish, brought suit in attachment against Caroline Payne to recover $6,075 for moneys advanced and services rendered as attorneys. The case was tried before the court without a jury, and judgment was entered in favor of the plaintiffs for the amount of their claim, to reverse which this writ of error is prosecuted.

In the affidavit for attachment, plaintiffs stated that their action was based upon an account stated, the nature of which is "for moneys due and owing to said Daniel A. Levy, John F. Tyrrell and William H. Devenish doing business as Levy, Tyrrell and Devenish, * * * agreed upon on, towit, the eighth day of July, 1914." Certain parties were served as garnishees, and Mrs. Payne being a nonresident was served by publication. She filed an affidavit of merits denying plaintiff's claim <u>in toto</u>. On May 28th, on motion of the defendant, due notice thereof having been given to plaintiffs, an order was entered giving the defendant leave

DANIEL A. LEVY, JOHN E. TYRRELL and WILLIAM H. DEVENISH, doing business as Levy, Tyrrell & Devenish, Defendants in Error,	ERROR TO
vs.	JUDICIAL DIST. OF CO. ORLEANS.
MADELINE PAYNE, Plaintiff in Error.	

MR. JUSTICE DUFFY DELIVERED THE OPINION OF THE COURT.

Daniel A. Levy, John E. Tyrrell and William H. Devenish, doing business as Levy, Tyrrell & Devenish, brought suit in attachment against Madeline Payne to recover $6,075 for money advanced and services rendered as attorneys. The case was tried before the court without a jury, and judgment was entered in favor of the plaintiff for the amount of their claim, to reverse which this writ of error is prosecuted.

In the affidavit for attachment, plaintiffs stated that their action was based upon an account stated. The nature of which is "for money due and owing to said claimants A. Levy, John E. Tyrrell and William H. Devenish doing business as Levy, Tyrrell and Devenish, * * * rendered upon request, the eighth day of July, 1914." Trial notice was served on garnishees, and the Kayne Bank a garnishment was served by full notice. The filed an affidavit of merits denying plaintiff's claim in toto. On May 28th, on motion of the defendant, the notice theretofore having been given to plaintiffs, an order was entered giving the defendant leave

to file interrogatories instanter, which the plaintiffs were ruled to answer in one day, and the case was continued to June 28th to allow defendant to take depositions. The interrogatories and answers thereto were filed on the same day. The answers, however, through an error in numbering, were placed in the files of another case, and the error was not discovered until the 24th or 25th of June, when the correction was made and the answers put in the proper files. The case came on for hearing on June 28th, and counsel for the defendant moved for a continuance of at least thirty days to enable them to take the depositions of the defendant and another witness. The court denied the motion, evidence was introduced on behalf of the plaintiffs and judgment was entered in their favor.

In support of defendant's motion for a continuance two affidavits were read, one made by a clerk employed in the office of defendant's counsel, who swears that during the period from May 28th to June 22nd, at intervals of every two or three days, he searched the files in the case for plaintiffs' answers to defendant's interrogatories, that he also searched the records of the Municipal Court; that such answers were not in the files, and that the records did not show they had been filed.

The other affidavit was made by one of defendant's counsel, wherein he stated that on or about May 10th, when the case was called for trial, he stated in open court to one of the plaintiffs that the defendant, Caroline Payne, resided in New York; that she was an actress and was also known as Mrs. Leslie Carter; that she had an engagement in London, England; that to keep such engagement she would be required to leave the following Friday from New York for

to file interrogatories immediately, which the plaintiffs were ready to answer in one day, and the case was continued to June 25th to allow defendant to take depositions. The interrogatories and answers thereto were filed on the same day. The answers, however, through an error in numbering, were placed in the file of another case, and therefore was not discovered until the 24th or 25th of June, when the correction was made and the answers put in the proper file. The case came on for hearing on June 26th, and counsel for the defendant moved for a continuance of at least thirty days to enable them to take the depositions of the defendant and another witness. The court denied the motion, evidence was introduced on behalf of the plaintiffs and judgment was entered in their favor.

In support of defendant's motion for a continuance the affidavits were read, one made by a clerk employed in the office of defendant's counsel, who swears that during the period from May 25th to June 26th, at intervals of every two or three days, he searched the files in the case for plaintiffs' answers to defendant's interrogatories, that he also searched the records of the municipal Court; that such answers were not in the files, and that the records did not show they had been filed.

The other affidavit was made by one of defendant's counsel, wherein he states that on or about May 1st, when the case was called for trial, at issue in open court to one of the plaintiffs and the defendant, the latter stated in New York; that the said defendant's counsel was also known as Mrs. Amelia Earhart; that he had an engagement in London, England; that to keep such engagement she would be required to leave the following Friday from New York; that

London and would not return until the latter part of August; that counsel for defendant then stated if plaintiffs would stipulate before the following Tuesday the depositions of the defendant and her New York counsel would be taken; that if the stipulation was not entered into counsel would ask that the case be continued until defendant's return, or until the depositions of herself and her New York counsel could be taken; that one of plaintiffs in open court then stated that he would advise defendant's counsel before the following Tuesday whether plaintiffs would enter into such a stipulation; that said plaintiffs did not notify counsel for the defendant until Friday, the day preceding the departure of the defendant for London; that on May 28th, when the case again came on for hearing, defendant's counsel stated that the defendant was in London, and moved for a continuance so that her deposition might be taken, and further that leave be given defendant's counsel to file interrogatories and for a rule on plaintiffs to answer the same in one day; that from May 28th to June 22nd he appeared in the clerk's office of the Municipal Court every second day, Sundays excepted, and examined the files and orders in the case to see if plaintiffs' answers to the interrogatories had been filed; that the answers were not in the files and no notation appeared on the record showing they had been filed; that without these answers defendant's counsel could not intelligently take the depositions of defendant and other witnesses; that neither the defendant nor her counsel knew what the plaintiffs' claim was until the answers were found in the files; that upon finding such answers counsel immediately wrote defendant in London, but had received no reply.

London and would not return until the latter part of August; that counsel for defendant then stated if plaintiff would stipulate before the following Tuesday the depositions of the defendant and her New York counsel would be taken; that if the stipulation was not entered into counsel would ask that the case be continued until defendant's return, or until the depositions of herself and her New York counsel could be taken; that one of plaintiff's in open court then stated that he would advise defendant's counsel before the following Tuesday whether plaintiff would enter into such a stipulation; that said plaintiff did not notify counsel for the defendant until Friday, the day preceding the expiration of the defendant for London; that on July 25th, when the case again came on for hearing, defendant's counsel stated that the defendant was in London, and asked for a continuance so that her depositions might be taken, and that a test issue be given defendant's counsel to file interrogatories and for a rule on plaintiffs to answer the same in one day; that from May 28th to June 22nd he searched in the clerk's office of the Municipal Court every second day, Sunday excepted, and examined the files and dockets in the case to see if plaintiff's answers to the interrogatories had been filed; that the answers were not in the files and no notation appeared on the docket showing they had been filed; that without these answers defendant's counsel could not intelligently take the depositions of defendant or other witnesses; that neither Mr. [illegible] nor counsel knew that the plaintiff's claim was [illegible] the answers were filed; that [illegible] finding no answers [illegible] lately wrote defendant in London, but has [illegible] reply.

The affidavit further stated that the continuance was not for the purpose of delay, but for the sole purpose of enabling the defendant to make a proper defense; that he was informed and believed that the defendant would deny plaintiffs' claim that there was an account stated; that if the cause was continued thirty days he would also take the deposition of defendant's New York counsel, who he is informed will also deny that there was an account stated as set forth in plaintiffs' affidavit.

From the foregoing it clearly appears that the plaintiffs' affidavit for attachment did not sufficiently inform the defendant as to the nature of plaintiffs' claim to enable her to prepare her defense, and that she did not have such information until the answers to her interrogatories were found in the files of the case four or five days before the day set for trial, which was then too late to permit the taking of her deposition and that of her New York counsel. It is evident that the court in continuing the case from May 28th to June 28th was of the opinion that at least thirty days' time would be required to enable counsel for the defendant to take defendant's deposition in London, as she was sailing on that date, and it was through no fault of the defendant or her counsel that the answers to the interrogatories were misplaced, and as these answers were not found until three or four days before the date of the trial, it is clear that the depositions could not be taken at that time. Under these circumstances, the court should have granted the continuance, and not to do so was an abuse of discretion.

The affidavit further stated that the continuance was not for the purpose of delay, but for the sole purpose of enabling the defendant to make a proper defense; that he was informed and believed that the defendant would deny plaintiffs' claim that there was an account stated; that if the cause was continued thirty days he would also take the deposition of defendant's New York counsel, who he is informed will also deny that there was an account stated as set forth in plaintiffs' affidavit.

From the foregoing it clearly appears that the plaintiffs' affidavit for attachment did not sufficiently inform the defendant as to the nature of plaintiffs' claim to enable her to prepare her defense, and that she did not have such information until the answers to her interrogatories were found in the files of the case four or five days before the day set for trial, which was then too late to permit the taking of her deposition and that of her New York counsel. It is evident that the court in continuing the case from May 28th to June 28th was of the opinion that at least thirty days' time would be required to enable counsel for the defendant to take defendant's deposition in London, as she was sailing on that date, and it was through no fault of the defendant or her counsel that the answers to the interrogatories were misplaced, and so these answers were not found until three or four days before the date of the trial. It is clear that the depositions could not be taken at that time. Under these circumstances, the court should have granted the continuance, and not to do so was an abuse of discretion.

As there will have to be a new trial, it is necessary for us to pass on some of the contentions made by the defendant. The defendant contends that under the rules of the Municipal Court, plaintiffs were required to file a statement of claim; that plaintiffs filed no statement of claim, and that no valid judgment can be entered without such statement. This contention is without merit, as there was a statement of claim in plaintiffs' affidavit of attachment, and it was unnecessary to file another.

Defendant also contends that as the trial judge was a county judge of Henderson county, he was not authorized to try the case, as it involved more than $1,000 which is the limit of the jurisdiction of the County Court. In support of this contention defendant cites the case of Healy, Admr. v. Mobile & Ohio R. R. Co., 161 Ill. App. 138. That case is not in point, as the court there was passing on section 14 of the act in relation to city courts, while in the case at bar section 13 of the Municipal Court act applies, and its terms are much broader than those of said section 14. Furthermore the Supreme Court of this state has held that a county judge is authorized to hold court in the Municipal Court of Chicago. American Badge Co. v. Lena Park Improvement Association, 246 Ill. 589.

The further contention made by the defendant that as plaintiffs' claim had been assigned to one H. B. King, the suit could not be maintained in the name of the plaintiffs. This contention was not brought to the attention of the trial judge, and cannot be urged for the first time in a court of review, but as the case must be reversed

As there will have to be a new trial, it is unnecessary for us to pass on some of the contentions made by the defendant. The defendant contends that under the rules of the municipal Court, plaintiffs were required to file a statement of claim; that plaintiffs filed no statement of claim, and that no valid judgment can be entered without such statement. This contention is without merit, as there was a statement of claim in plaintiffs' affidavit of attachment, and it was unnecessary to file another.

Defendant also contends that as the trial judge was a county judge of Henderson county, he was not authorized to try the case, as it involved more than $5,000 which is the limit of the jurisdiction of the County Court. In support of this contention defendant cites the case of Ingly, Adm. v. Mobile & Ohio R. R. Co., 121 Ill. App. 1[illegible]. That case is not in point, as the court was trying on section 16 of the act in relation to city courts, while in the case at bar section 10 of the municipal court act applies, and its terms are much broader than those of section 16. Furthermore the supreme Court of this state has held that a county judge is authorized to hold court in the municipal Court of Chicago. Martinez Lumber Co. v. Home Park Improvement Association, 4[illegible] Ill. 2[illegible].

The further contention made by the defendant that as plaintiffs' claim had been assigned to one H. S. [illegible], the suit could not be maintained in the name of the plaintiffs. This contention was not raised in the motion of the trial judge, and cannot be raised for the first time in a court of review, as in the case may be presented

and the cause remanded for a new trial, the error, if any, may be cured by showing that the suit is brought for the use of King.

For the error in refusing to grant the continuance, the judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

and the cause remanded for a new trial. The error, if any, may be cured by showing that the suit is brought for the use of King.

For the error in refusing to grant the continuance, the judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

412 - 21810

ANNA BRADLEY,
Appellee,

vs.

SIEGFRIED (alias Sigmund) SCHRAYER,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

204 I.A. 231

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

This case is a stench in the nostrils of a court of justice. It was brought by the plaintiff, an admitted prostitute, against the defendant, who the evidence shows was equally devoid of morals, to recover damages for a breach of contract of marriage. We will not defile the records of this court by referring to the evidence. The jury returned a verdict in favor of the plaintiff for $9,750. The court required a remittitur of $4,750 and entered judgment for $5,000.

At the request of the plaintiff the court instructed the jury that if they believed from the evidence that there was a contract of marriage entered into between the parties, and the defendant failed to carry out the contract "without good and legal cause therefor;" and that plaintiff was damaged by reason of such failure to carry out his promise, then they should find for the plaintiff. This instruction is clearly erroneous, as it left the jury to determine what was a good and legal cause which would warrant the defendant in refusing to marry the plaintiff. This was a question of law to be decided by the trial judge, and not a question of fact for the jury.

AIR - SIGIO

ANNA BRADLEY,

Appellee,

ARTHUR ENOS

vs.

SUPERIOR COURT,

COOK COUNTY.

SIGOURNEY (alias Sigmund) SCHULAYER,
Appellant.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

This case is a stench in the nostrils of a court of justice. It was brought by the plaintiff, an admitted prostitute, against the defendant, who the evidence shows was equally devoid of morals, to recover damages for a breach of contract of marriage. We will not defile the records of this court by repeating in the evidence. The jury returned a verdict in favor of the plaintiff for $2,750. The court required a remittitur of $4,750 and entered judgment for $5,000.

At the request of the plaintiff the court instructed the jury that if they believed from the evidence that there was a contract of marriage entered into between the parties, and the defendant failed to carry out the contract "without good and legal cause to excuse;" and that plaintiff was damaged by reason of such failure to carry out his promise, then they should find for the plaintiff. This instruction is clearly erroneous, as it left the jury to determine if there was a good and legal cause which would warrant the defendant in refusing to marry the plaintiff. This was a question of law to be decided by the trial judge, and not a question of fact for the jury.

Instruction No. 9 is subject to the same objection.

Complaint is made of the action of the court in refusing instructions No. 3, 4 and 5, offered on behalf of the defendant. These instructions were properly refused.

For the errors in giving the instructions above mentioned, the judgment of the Superior Court of Cook County is reversed and the cause remanded.

REVERSED AND REMANDED.

Instruction No. 9, is subject to the same objection.

Complaint is made of the action of the court in refusing instructions No. 3, 4 and 5, offered on behalf of the defendant. These instructions were properly refused.

For the errors in giving the instructions above mentioned, the judgment of the Superior Court of Cook County is reversed and the cause remanded.

REVERSED AND REMANDED.

534 - 21932

GEORGE E. DIERSSEN, et al., Appellees.	APPEAL FROM
vs.	MUNICIPAL COURT
NATIONAL BEN FRANKLIN FIRE INSURANCE CO., Appellant.	OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

This is a suit brought on a fire insurance policy, and a judgment was entered in favor of the plaintiffs for $1596.57. By stipulation of the parties, the decision of this court in the case of George E. Diersseen, et al. v. Williamsburg City Fire Insurance Company, General No.21931, controls the decision in this case. The judgment in that case having this day been affirmed, it follows that the judgment of the Municipal Court of Chicago in this case must also be affirmed.

AFFIRMED.

324 - 21932

GEORGE F. DIERSSEN, et al.,
Appellees.

vs.

NATIONAL BEN FRANKLIN FIRE
INSURANCE CO.,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

This is a suit brought on a fire insurance policy, and a judgment was entered in favor of the plaintiffs for $1268.57. By stipulation of the parties, the decision of this court in the case of George F. Diersen, et al. v. Milliamsburg City Fire Insurance Company, General No.21931, controls the decision in this case. The judgment in that case having this day been affirmed, it follows that the judgment of the Municipal Court of Chicago in this case must also be affirmed.

AFFIRMED.

535 - 21933

GEORGE F. DIERSSEN, et al., Appellees.	APPEAL FROM
vs.	MUNICIPAL COURT
THE ALBANY INSURANCE COMPANY, Appellant.	OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

This is a suit brought on a fire insurance policy, and a judgment was entered in favor of the plaintiffs for $1064.38. By stipulation of the parties, the decision of this court in the case of George E. Diersen, et al. v. Williamsburg City Fire Insurance Company, General No.21931, controls the decision in this case. The judgment in that case having this day been affirmed, it follows that the judgment of the Municipal Court of Chicago in this case must also be affirmed.

AFFIRMED.

515 - 21825

GEORGE E. BIERSTEN, et al., Appellees.	
vs.	APPEAL FROM
THE ALBANY INSURANCE COMPANY, Appellant.	MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

This is a suit brought on a fire insurance policy, and a judgment was entered in favor of the plaintiffs for $1064.38. By stipulation of the parties, the decision of this court in the case of George E. Biersten, et al. v. Williamsburg City Fire Insurance Company, General No.21831, controls the decision in this case. The judgment in that case having this day been affirmed, it follows that the judgment of the Municipal Court of Chicago in this case must also be affirmed.

AFFIRMED.

6 - 22059

EDWARD THOMPSON, a corporation, Defendant in Error,	ERROR TO MUNICIPAL COURT OF CHICAGO.
vs.	
JOHN GIBSON HALE, Plaintiff in Error.	

204 I.A. 247

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

The writ of error in this case seeks to review the record of a judgment of the Municipal Court of Chicago. The plaintiff brought suit against the defendant to recover the purchase price of certain books. The case was tried before the court without a jury, and a judgment entered in favor of the plaintiff for the amount of its claim. The defendant moved the court to set aside the judgment, which motion was denied, and filed a "statement of the case" showing the proceedings had on such motion to vacate. This court heretofore, on motion of the plaintiff, struck from the record said statement of the case.

Plaintiff has moved this court to affirm the judgment, and as all of the assignments of error are based on such statement of the case, there is nothing for this court to pass upon, and the motion of the plaintiff will be allowed.

The judgment of the Municipal Court is therefore affirmed.

AFFIRMED.

EDWARD THOMPSON, a corporation, Defendant in Error,	
vs.	ERROR TO
JOHN SIMON HALM, Plaintiff in Error.	MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

The writ of error in this case seeks to review the record of a judgment of the municipal court of Chicago. The plaintiff brought suit against the defendant to recover the purchase price of certain books. The case was tried before the court without a jury, and a judgment entered in favor of the plaintiff for the amount of its claim. The defendant moved the court to set aside the judgment, which motion was denied, and filed a "bill of exceptions" showing the proceedings had on such motion in evidence. The court thereupon, on motion of the plaintiff, struck from the record such statement of the case.

Plaintiff has moved this court to affirm the judgment, and on all of the assignments of error and briefs on such statement of the case, we are asked to reverse the judgment of the court below, and by order of this court judgment be allowed.

The judgment of the municipal court of Chicago is affirmed.

331 - 21727

ABRAHAM SILBAR, Defendant in Error, vs. FRANK W. KNGWALD, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

The plaintiff in error seeks the reversal of a judgment against him for two months' rent under a lease. The only witnesses were the parties themselves. The testimony of the defendant in error was to the effect that the plaintiff in error, who was his tenant under an unexpired, written lease, asked him to try to rent the premises for him for the rest of the term, and although he attempted to do so, he was unable to find another tenant. The testimony of the plaintiff in error was to the effect that defendant in error had accepted a surrender of the premises.

In these circumstances, it is impossible for us to say that the court's finding in favor of the defendant in error was manifestly contrary to the weight of the evidence. As there is no other question involved, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

ABRAHAM SAMMAN,
Defendant in Error,

vs.

MEAKE v. MORGAN,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DUNN delivered the opinion of the court.

The plaintiff in error seeks the reversal of a judgment against him for two months rent under a lease. The only witnesses were the parties themselves. The testimony of the defendant in error was to the effect that the plaintiff in error, who was his tenant under an unexpired written lease, asked him to try to rent the premises for him for the rest of the term, and although he attempted to do so, he was unable to find another tenant. The testimony of the plaintiff in error was to the effect that defendant in error had accepted a surrender of the premises.

In these circumstances, it is impossible for us to say that the municipal finding in favor of the defendant in error was manifestly contrary to the weight of the evidence. As there is no other question involved, the judgment of the municipal court will be affirmed.

AFFIRMED.

345 - 21742.

WILLIAM B. PROUTY, Defendant in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
JULIAN ARMSTRONG, Plaintiff in Error.	)	OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

This writ of error is sued out to reverse an order entered by the Municipal Court, denying the motion of plaintiff in error to vacate a judgment against him for $190.00, entered pursuant to a power of attorney contained in a certain lease. The lease itself contained the following stipulation: "Lease is drawn subject to the attached further agreement signed by both parties to this lease. The lease is made subject to the following:" Then follows eleven items containing improvements to be made by the defendant in error, closing with the following words: "All the above work except installing boiler to be completed by May 10th."

In support of his motion to open up the judgment and for leave to plead, the plaintiff in error set out the failure of defendant in error to comply with the agreement referred to, and that he did not complete said work until two months thereafter; that in consequence, the premises were not ready for occupancy until the latter date, and further set out with great particularity items of damage resulting from this alleged failure of the defendant in error to comply with his covenants, amounting in all to $243.00.

The motion to vacate the judgment and for leave to plead was made with due diligence, and the facts set up in the affidavit, if true, would have constituted a complete defense to the action on the lease. The contention of the defendant in error is, however, that the facts set up, at most, amounted merely to a counter claim, and did not consti-

No. - 21742.

WILLIAM R. PROCTOR,
Defendant in Error,

vs.

JULIAN ALEXANDER,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

204 I.A. 249

Mr. JUSTICE COOKSIN delivered the opinion of the court.

This writ of error is sued out to reverse an order entered by the Municipal Court, denying the motion of plaintiff in error to vacate a judgment against him for $180.00, entered pursuant to a power of attorney contained in a certain lease. The lease itself contained the following stipulation: "Lease is drawn subject to the attached further agreement signed by both parties to this lease. The lease is made subject to the following: Then follows eleven items containing improvements to be made in the defendant in error, closing with the following words: "All the above work must be satisfactorily completed by May 30th."

In support of his motion to vacate the judgment and for leave to plead, the plaintiff in error set out the failure of defendant in error to comply with the agreement referred to, and that he did not complete said work within the month. Nevertheless, that he gave notice. The premises were not ready for occupancy until the latter part of October, but with good reasonable diligence issue of fact relating thereto while alleged failure on the defendant in error to comply with his agreement, counsel for [illegible] 180.00.

The motion to vacate the judgment and for leave to plead was made with due diligence, and the [illegible] with the affidavit, if true, would have a meritorious defense to the action on the lease. The contention of the defendant in error is, however, that [illegible] such, executed merely to a corporation [illegible]

tute a defense, and that in such a case, the judgment will not be opened up, but the judgment debtor will be left to his action. It is true that it has been held that a judgment will not be opened up in order that the defendant may maintain a mere cross action which does not grow out of the same subject matter or agreement, but here, the agreement in regard to improvements to be made by the lessor is incorporated in, and is a part of, the lease. Had the plaintiff in error alleged damages on account of the defendant in error's failure to keep these covenants as a matter of recoupment only, it would have been the duty of the court to consider it like any other defense, since such a course tends to promote justice and avoid a multiplicity of suits. We think that by a parity of reasoning, a defendant ought to be permitted to open up a judgment where he presents an affidavit which shows that by reason of the plaintiff's failure to comply with the terms of the instrument sued on, he is entitled not merely to defeat the plaintiff's action, but to recover a judgment against him. The case is clearly distinguishable from cases where defendants have sought leave to open up a judgment and set up a claim growing out of an entirely different subject matter. We are, therefore, of the opinion that the action of the court in refusing to grant defendant's motion to open up the judgment and allow him leave to defend, was erroneous. Plaintiff further contends that this writ of error must be dismissed because "all errors were waived in the cognovit, and ample powers to confess judgment and waive errors were given in the lease." In such a case, a writ of error will not lie to review the judgment itself, but where a timely motion is made to set aside the judgment, the writ lies to review the action of the court in overruling the motion. (Boyles v.

tute a defense, and that in such a case, the judgment will not be opened up, but the judgment debtor will be left to his action. It is true that it has been held that judgment will not be opened up in order that the defendant may maintain a mere cross action which does not prove out of the same subject matter or agreement, but here, the agreement in regard to improvements is to be made by the lessor in incorporated in, and is a part of, the lease. And the plaintiff's error alleged damages on account of the defendant's error's failure to keep these covenants as a reason of recovement only, it would have been the duty of the court to consider it like any other defense. Also such a course tends to promote justice and avoid a multiplicity of suits. We think that by a parity of reasoning, a defendant ought to be permitted to open up a judgment where he presents an affidavit which shows that by reason of the plaintiff's failure to comply with the terms of the instrument sued on, he is entitled not merely to defend the plaintiff's action, but to recover a judgment against him. The case is clearly distinguishable from cases where defendant has sought leave to open up a judgment and set up a claim resting out of an entirely different subject matter. In such cases, decisions of the opinion that the action of the court in refusing to grant defendant's motion to open up the judgment and allow him leave to defend, was erroneous. In fact, this country cases that take with it error that [illegible] "all errors were waived in the judgment, and only cases to confess judgment and have errors [illegible] lease." In such a case, a writ of error will [illegible] review the judgment itself, but [illegible] made to set aside the judgment, [illegible] action of the court in overruling his motion. (Italics y-

Chytraus, 175 Ill. 370.)

The order denying the motion of defendant to vacate the judgment is reversed and the cause remanded to the Municipal Court for further proceedings in harmony with the views herein expressed.

ORDER REVERSED
AND CAUSE REMANDED.

Civitanus, 175 III. 370.)

The order denying the motion of defendant to vacate the judgment is reversed and the cause remanded to the Municipal Court for further proceedings in harmony with the views herein expressed.

JOHN M. WOODWARD,
ALL JUDGES CONCURRING.

355 - 21752.

BENJAMIN BROOK, (James P. Pio, Defendant in Error,)	)	ERROR TO
vs.	)	MUNICIPAL COURT
GEORGE F. SMERLING and FRED SMERLING, Plaintiffs in Error.	)	OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Plaintiffs in error seek to set aside a judgment for an attorney's lien entered upon the petition of the defendant in error. For the sake of brevity, the defendant in error will be referred to as the petitioner, plaintiffs in error as defendants, and the original plaintiff in the case, as plaintiff.

The record discloses that plaintiff brought suit against the defendants to recover for personal injuries alleged to have resulted from the defendants' negligence. Petitioner, who was the attorney for the plaintiff, filed his petition for an attorney's lien, April 21, 1915, alleging that notice of his attorney's lien had been personally served upon defendants, and a settlement of the suit had been made with plaintiff without the knowledge or consent of the petitioner. A judgment for $300 was entered on this petition June 4, 1915, and a motion to vacate this judgment was made July 1, 1915. From the statement of facts it appears that in support of this motion, attorney for defendants presented an affidavit which set out that he had been served with a copy of a notice that petitioner would appear in court Monday, May 30, 1915, and ask to have his petition set down for a hearing; that petitioner called the affiant on the telephone, and told him that as Monday was Decoration Day, he would present his motion on Tuesday; that affiant told the petitioner that he would be unable to appear Tuesday, and that thereupon petitioner told him he

BEE - 21768.

BENJAMIN MOORE,
(James P. Pio, Defendant in Error,) ERROR TO
vs. MUNICIPAL COURT
GEORGE D. BURKLIN and OF CHICAGO.
BURKLIN BROTHERS,
Plaintiffs in Error.

204 I.A. 250

MR. JUSTICE DOUGLAS delivered the opinion of the court.

Plaintiffs in error seek to set aside a judgment for an attorney's lien entered upon the petition of the defendant in error. For the sake of brevity, the defendant in error will be referred to as the petitioner, plaintiffs in error as defendants, and the original plaintiff in the case, as plaintiff.

The record discloses that plaintiff brought suit against the defendants to recover for personal injuries alleged to have resulted from the defendants' negligence. Petitioner, who was the attorney for the plaintiff, filed his petition for an attorney's lien, March 8, 1918, alleging that notice of his attorney's lien had been personally served upon defendants, and a settlement of the suit had been made with the plaintiff without the knowledge or consent of the petitioner. A judgment for $[illegible] was entered on this petition June 4, 1918, and a motion to vacate this judgment was made July 1, 1918. From the [illegible] it appears that in support of this motion, attorney for defendants presented an affidavit which [illegible] had been served with a copy of a notice [illegible] would appear in court [illegible] and [illegible] petition not [illegible] for a [illegible] affidavit on the telephone, and said [illegible] Democratic Day, he would present [illegible] that affiant told the petitioner [illegible] to appear Tuesday, and that [illegible]

would let him know the day and hour of the hearing, and that affiant suggested Thursday of the week following. Affidavits of defendants were also presented, tending to show that one only had been served with notice of the lien, that the injury to the plaintiff was not their fault, and that they had settled the matter for $35.00. The petitioner's affidavit stated that he had served notice on attorney for the defendants that he would appear on Monday, May 31, and ask to have the petition set for a day certain, but afterwards he learned that all causes set for Monday had been continued for Tuesday, and thereupon he called up the said attorney and told him that he would appear Tuesday instead; that he never agreed to notify him in regard to the date of the hearing; that he did appear on Tuesday; that the case was set for Friday, June 4, at two o'clock, and that it was heard at that time. Upon the reading of these affidavits the court announced that the judgment would be set aside on the payment of $50.00 attorney's fees, to which the petitioner objected. The court then said that the defendants were entitled to have their day in court, and the attorney for the defendants said, "It is satisfactory to me. Will the court give a week to pay it?" to which the court said, "yes." Thereafter, at the request of defendants' attorney, the time for paying the $50.00 was extended one week, and afterwards it was again extended by stipulation. After the expiration of this extention, and on account of the failure of the defendants to pay the $50.00 attorney's fees, the court vacated the order setting aside the judgment, and its action in so doing is assigned as error.

In the absence of any bill of exceptions, we must, of course, assume that sufficient evidence was introduced at the hearing June 4, to sustain the court's findings in favor of petitioner. The only questions before the court, therefore,

would let him know the day and hour of the hearing, and that affiant suggested Thursday of the week following. Affidavits of defendants were also presented, tending to show that one only had been served with notice of the filer, that the injury to the plaintiff was not their fault, and that they had settled the matter for $25.00. The petitioner's affidavit stated that he had served notice on attorney for the defendants that he would appear on Monday, May 21, and ask to have the petition set for a day certain, but afterwards he learned that all causes set for Monday had been continued for Tuesday, and thereupon he called up the said attorney and told him that he would appear Tuesday instead; that he never agreed to notify him in regard to the date of the hearing; that he did appear on Tuesday; that the case was set for Friday, June 3, at two o'clock, and that it was heard at that time. Upon the reading of these affidavits the court announced that the judgment would be set aside on the payment of $25.00 attorney's fees to which the petitioner objected. The court then said that the defendants were entitled to a jury trial in court, and the attorney for the defendants said, "It is satisfactory to me. Will the court give a week to pay it?" to which the court said, "Yes." Thereafter, at the request of the defendant's attorney, the time for paying the $25.00 was [illegible] and afterwards it was again continued [illegible]. After the application of this character, and [illegible] of the defendants in the $25.00 [illegible], the court vacated the order [illegible] the [illegible] section [illegible]

In the absence of any bill of exceptions [illegible], of course, assume that sufficient evidence [illegible] was produced at the hearing upon the question [illegible] of petitioner. The only question before [illegible] court, therefore,

are as to whether the Municipal Court was warranted in imposing terms in its order vacating the judgment in favor of the petitioner, and whether, upon the failure of defendants to comply with the condition by paying $50.00 attorney's fees, the court was justified in setting aside the order vacating the judgment.

The statement of facts discloses that attorney for the defendants had actual and timely notice of the fact that petitioner would apply to the court on Tuesday, June 1, and ask to have the petition set for hearing. In view of the fact that defendants' attorney had before him a written notice of the time and place and purpose of the application, and was fully advised of the change in the time, and made no objection to it, we are of the opinion that he must be considered as having been duly notified. The question of whether petitioner told him that he would inform him in regard to the time when the cause was to be heard, is in dispute, but we do not think it controlling, since defendants' attorney had actual notice of the application, and could easily have informed himself as to what order the court had entered. We are therefore of the opinion that it was well within the discretion of the presiding judge to impose terms upon the vacation of the judgment in favor of petitioner; but if it had not been, defendants are in no position to object, in view of the fact that their counsel in open court stated that the order in which the terms were imposed, was satisfactory to him. Drinkwater v. Davidson, 90 Ill. App. 9, cited by counsel for defendants, is not in point, since in that case, on the showing made, it was clearly the duty of the court to vacate the order complained of without conditions, and objection to the imposition of conditions was expressly made. The right of the court, in a proper case, to require the payment of attorney's fees as a condition to

are as to whether the municipal court was warranted in imposing terms in its order vacating the judgment in favor of the petitioner, and whether, upon the failure of defendants to comply with the condition by paying $50.00 attorney's fees, the court was justified in setting aside the order vacating the judgment.

The statement of facts discloses that attorney for the defendants had actual and timely notice of the fact that petitioner would apply to the court on Tuesday, June 1, and ask to have the petition set for hearing. In view of the fact that defendants' attorney had before him a written notice of the time and place and purpose of the application, and was fully advised of the change in the time, and made no objection to it, we are of the opinion that he must be considered as having been duly notified. The question of whether petitioner told him that he would inform him in regard to the time when the cause was to be heard, is in dispute, but we do not think it controlling, since defendants' attorney had actual notice of the application, and could easily have informed himself as to what order the court had entered. In are therefore of the opinion that it was well within the discretion of the presiding judge to impose terms upon the vacation of the judgment in favor of petitioner, but if it had not been, defendants are in no position to object. In view of the fact that their counsel in open court stated that the order in which the terms were imposed, was satisfactory to him. Chicago v. Hughes, 90 Ill. App. 1, cited by counsel for appellant, is not in point, since in that case, on the showing made, it was clearly the duty of the court to vacate the order complained of without conditions, and objection to the imposition of conditions was expressly made. In right of the court, in a proper case, to require the payment of attorney's fees as a condition to

the vacation of an order or judgment is not, in our opinion, subject to question. It was clearly within the scope of defendants' attorney's authority to consent to the terms imposed as a condition in the order setting aside the judgment. It is contended on behalf of defendants, however, that the court erred in including plaintiff's costs in the judgment in favor of petitioner. Obviously, petitioner, who was seeking the enforcement of his own lien, had no right to have plaintiff's costs included in his judgment.

The judgment of the Municipal Court in favor of petitioner for $300.00 is, therefore, affirmed, but the item of plaintiff's costs in the trial court, which was included in the judgment, is disallowed.

JUDGMENT AFFIRMED EXCEPT
AS TO PLAINTIFF'S COSTS.

the vacation of an order or judgment is not, in our opinion, subject to question. It was clearly within the scope of defendants' attorney's authority to consent to the terms imposed as a condition in the order setting aside the judgment. It is contended on behalf of defendants, however, that the court erred in holding plaintiff's costs in the judgment in favor of petitioner. Obviously, petitioner, who was enforcing the enforcement of his own lien, had no right to have plaintiff's costs included in his judgment.

The judgment of the Municipal Court in favor of petitioner for $800.00 is, therefore, affirmed, but the item of plaintiff's costs in the trial court, which was included in the judgment, is disallowed.

JUDGMENT AFFIRMED EXCEPT
AS TO LIEN. FIRM'S COSTS.

392 - 21790.

MICHAEL D. HARNETT, Defendant in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
CITY OF CHICAGO, Plaintiff in Error.	)	OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Plaintiff in error, which is hereinafter referred to as the City, seeks the reversal of a judgment against it for $937.50 in favor of the defendant in error, hereinafter referred to as plaintiff. It appears from the evidence that plaintiff served as police patrolman in the City of Chicago for a number of years prior to March 18, 1907, when he was certified by the Civil Service Commission as eligible for the position of sergeant of police, and that thereupon the superintendent of police appointed him to be sergeant of police, and he acted as such up to February 17, 1908, when he was demoted to the position of police patrolman, and continued to act as such until August 9, 1911, when he was promoted to be a detective sergeant, and that since that time he has acted for two years as patrol sergeant, and one year as desk sergeant. The judgment was rendered for the difference between the salary of patrolman and that of sergeant during the interim in which he was acting as patrolman.

It is a sufficient answer to plaintiff's claim of a right of recovery to say that the evidence fails to show that there was, on April 20, 1907, in the City of Chicago, any office of police sergeant, for it is well established in this State that where a party seeks to recover the salary of an office, he must show the legal existence of the office and his right to hold it. It has been repeatedly held that the ordinance of April 18, 1881, upon which plaintiff relies, and which created the police department and certain positions, did not create the position of detective sergeant, patrol

EDWARD D. MADDEN, Defendant in Error,	ERROR TO
vs.	MUNICIPAL COURT
CITY OF CHICAGO, Plaintiff in Error.	OF CHICAGO.

MR. JUSTICE COOGAN delivered the opinion of the court.

Plaintiff in error, which is hereinafter referred to as the City, seeks the reversal of a judgment against it for $997.60 in favor of the defendant in error, hereinafter referred to as plaintiff. It appears from the evidence that plaintiff served as police patrolman in the city of Chicago for a number of years prior to March 10, 1907, when he was certified by the Civil Service Commission as eligible for the position of sergeant of police, and that thereupon the superintendent of police appointed him to be sergeant of police, and he acted as such up to February 17, 1908, when he was demoted to the position of police patrolman, and continued so not as such until August 9, 1911, when he was promoted to be a detective sergeant, and that since that time he has served for two years as patrol sergeant and two years as desk sergeant. The judgment was rendered for the difference between the salary of patrolman and that of sergeant during the interim in which he was [illegible].

It is a sufficient answer [illegible] that of a right of recovery to say that the [illegible] that there was, on April 20, 1907, [illegible] any office of police sergeant. For [illegible] in this state that where a [illegible] salary of an office, no suit for the [illegible] and his right to hold it. [illegible] conditions of April 1, 1907 [illegible] and which created the police [illegible] did not create the position of [illegible] sergeant.

sergeant, desk sergeant, or sergeant, since the words, "such number of lieutenants, detective sergeants, patrol sergeants, desk sergeants, patrolmen, and other employes as may be provided by ordinance," do not create these positions, but leave them to be thereafter created by ordinance. In this connection, the Supreme Court said, in Bullis v. City of Chicago, 235 Ill. 472, at page 478;

> "Section 1477 of the revised code, in providing that the police department should embrace as many patrolmen 'as has been or may be prescribed by ordinance,' cannot be regarded as creating any office of patrolman. (Moon v. Mayor, supra.) The word 'prescribed,' as there used, is equivalent to 'established.' On this record, whatever may be the fact, this evidence offered by appellant to prove that he was a police patrolman was not competent for that purpose."

In Moon v. The Mayor, 214 Ill. 40, the court said, at page 44:

> "'As many policemen as the city council may from time to time provide for,' cannot be construed to create any one or more offices of policemen of the city. Its true meaning is, that the police department of the city shall comprise such policemen as shall be legally invested with that office. The section does not, itself, purport to create the office of policeman, and it has no such legal effect."

Plaintiff further contends that the act of 1863, itself, created the office of sergeant of police. The Supreme Court, however, held, in the case of Bullis v. City of Chicago, supra, at page 475, that the organization of the city under the general law "determined the tenure of all officers under the special charter not within the saving clause of the act, which provided that the city officers in office at the time of organization under the general law, 'shall, thereupon, exercise the powers conferred upon like officers in this act until their successors shall be elected and qualified.' * * * The officers in office at the time of the adoption of the act who should exercise the powers conferred upon like officers by the act until their successors were elected and qualified, were only those officers holding under the special charter

sergeants, desk sergeant, or sergeant, since the words, "such number of lieutenants, detective sergeants, patrol sergeants, desk sergeants, patrolmen, and other employes as may be provided by ordinance," do not create these positions, but leave them to be thereafter created by ordinance. In this connection, the Supreme Court said, in Inglis v. City of Chicago, 256 Ill. 472, at page 476:

> "Section 1477 of the revised code, in providing that the police department should embrace as many patrolmen 'as has been or may be prescribed by ordinance,' cannot be regarded as creating any office of patrolman. (Conn v. Bryon, supra.) The word 'prescribed,' as there used, is equivalent to 'established.' In this record, whatever may be the fact, this evidence offered by appellant to prove that he was a police patrolman was not competent for that purpose."

In Conn v. The Mayor, 214 Ill. 40, the court said, at page 46:

> "As many policemen as the city council may from time to time provide for, cannot be constituted in counts by one or more ordinances of policemen of the city. The fact remaining is, that the police department of the city shall consist of such policemen as shall be legally invested with that office. The section does not, itself, purport to create the office of policemen, and it has no such legal effect."

Similarly Section 1477 contends that the act of 1903, itself, created the office of patrolman. In Inglis v. City of Chicago, however, Judge [illegible] in the case of Inglis v. City of Chicago, supra, at page 476, that the [illegible] of the city under the general law "later [illegible] the number of all officers under the special charter not within the [illegible] of the act, which provided that the [illegible] of the [illegible] of organization under the general law [illegible]. However, exercise the power conferred upon the officers in this act until their successors shall be elected and qualified, the officers in office at the time of the adoption of this act who should exercise the powers [illegible] by the act until their successors [illegible] and qualified, were only those officers [illegible] specially [illegible]

that answer to the same officers provided for in the general law."

Plaintiff, however, contends that the City, in its affidavit of merits, did not deny that the ordinance of April 18, 1881, and the act of 1863, created the office of sergeant of police. This claim is contradicted by the statement in the affidavit of merits, "that prior to March 12, 1911, there was no such office or position or place of employment as sergeant of police of the City of Chicago." Counsel further contends that The People v. McCann, 247 Ill. 130, overrules Bullis v. City of Chicago, supra, in that it holds that the ordinance of April 18, 1881, did create the office of inspector of police, but an examination of the ordinance shows that it expressly provided for "one inspector of police for each police division." To hold that such a phrase created the office of inspector would not be in conflict with a decision that the phrase, "and such number of lieutenants, detective sergeants, * * * as may be provided by ordinance," does not. Counsel further contends that clauses 66 and 68 of section 1 of article 5 of the Cities and Villages Act, create the office of sergeant of police. Those clauses are as follows: "Sixty-sixth. To regulate the police of the city or village, and pass and enforce all necessary police ordinances. Sixty-eighth. To prescribe the duties and powers of a superintendent of police, policemen and watchmen." Obviously, these clauses created no office whatsoever. Section 1909 of an ordinance of April 1, 1911, which, it is claimed, created the office of sergeant of police, is not controlling, since it did not go into effect until more than three years after plaintiff claims to have been wrongfully demoted.

that answer to the same officers provided for in the general law."

Plaintiff, however, concedes that the City, in its affidavit of merits, did not deny that the ordinance of April 18, 1921, and the act of 1923, created the office of sergeant of police. This claim is contradicted by the statement in the affidavit of merits, "that prior to March 18, 1921, there was no such office or position or place of employment as sergeant of police in the City of Chicago." Counsel further contends that The People v. McGann, 247 Ill. 180, overrules Mullin v. City of Chicago, supra, in that it holds that the ordinance of April 18, 1921, did create the office of inspector of police, but an examination of the opinion shows that it unnecessarily provided for "one inspector of police for each police district." To hold that such a phrase created the office of inspector would not be in conflict with a decision that the phrase, "and such number of lieutenants, detectives and sergeants, as may be provided by ordinance," [illegible]. Counsel further contends that clauses (b) and (c) of section 1 of article 2 of the Police and Welfare Act, [illegible] the office of sergeant of police. These clauses read as follows: [illegible] to regulate the police of the City [illegible] and enforce all necessary police ordinances [illegible] to prescribe the duties and powers of [illegible] policemen and watchmen." [illegible] to office whatsoever. [illegible] of April 1, 1923, which, it is claimed, [illegible] of sergeant of police, is not [illegible]. [illegible] until more than [illegible] after [illegible] had been [illegible].

In view of the fact that plaintiff has failed to show the legal existence of the office of police sergeant, or that during the time covered by this suit he performed the duties of such office, we are of the opinion that, under the doctrine laid down in the Bullis case, he is not entitled to recover. The judgment of the Municipal Court is, therefore, reversed.

REVERSED.

In view of the fact that plaintiff has failed to show the legal existence of the office of police sergeant, or that during the time covered by this suit he performed the duties of such office, we are of the opinion that, under the doctrine laid down in the Quilin case, he is not entitled to recover. The judgment of the Municipal Court is, therefore reversed.

DAVIDSON.

372 - 21769.

204 I.A. 254

STEPHEN J. BARRY, Defendant in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
CITY OF CHICAGO, Plaintiff in Error.	)	OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

The facts in the above entitled case are in all essential features similar to those set forth in Barnett v. City of Chicago, No. 21790, ante, p. _____, and for the same reasons as are there stated, the judgment in this case must also be reversed.

REVERSED.

373 - 21770.

PATRICK WOODS, Defendant in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
CITY OF CHICAGO Plaintiff in Error.	)	OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

The facts in the above entitled case are in all essential features similar to those set forth in Harnett v. City of Chicago, No. 21790, ante, p._____, and for the same reasons as are there stated, the judgment in this case must also be reversed.

REVERSED.

PATRICK COONEY,
Defendant in error,

vs.

CITY OF CHICAGO,
Plaintiff in error.

ERROR TO
CRIMINAL COURT
OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

The facts in the above entitled case are in all essential features similar to those set forth in Merrett v. City of Chicago, No. 21750, ante, p. _____, and for the same reasons as are there stated, the judgment in this case must also be reversed.

REVERSED.

465 - 21883.

EFFIE C. KUEBLER, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT,
GEORGE J. KUEBLER, Appellant.	)	COOK COUNTY.

204 I.A. 256

MR. JUSTICE GOODWIN delivered the opinion of the court.

Appellant seeks the reversal of so much of a divorce decree entered against him as relates to solicitor's fees and alimony. It appears that appellee filed her original bill against appellant, in which she sought a divorce from appellant on the ground of extreme and repeated cruelty, and further asked that a certain piece of property standing in the name of the appellant be decreed to be here in equity and good conscience, and that appellant convey this real estate to her, and that the court grant her alimony and solicitor's fees. An amended bill of complaint setting forth the same matters was afterwards filed. The answer of appellant denied the charges in the bill and her title to the property. Appellant filed a cross bill charging desertion, which appellee denied. The cause was referred to a master, who found that appellee's interest in the real estate in question amounted to $481.40, which had been subsequently paid her; that the title to the property was in appellant, subject to a trust deed of $3,000.00, and the dower rights of appellee; that the household furniture belongs to appellant, except the piano and certain other articles, and recommended that, so far as the property was concerned, the bill be dismissed. October 31, the cause was heard on the bill and cross bill, and the jury found appellant guilty of extreme and repeated cruelty and appellee not guilty of desertion. Afterwards, the matter came before the court June 5, 1915, for the purpose of fixing the terms of the decree, the adjustment of the property rights, and the matter of alimony

PERIN C. KUNKEL,
Appellee,

vs.

GEORGE J. KUNKEL,
Appellant.

APPEAL FROM
CHICAGO COURT,
COOK COUNTY.

204 I.A. 256

MR. JUSTICE SCHMIDT delivered the opinion of the court.

Appellant seeks the reversal of a decree of a divorce decree entered against him on relation to adultery, fornication and adultery. It appears that appellee filed her original bill against appellant, in which she sought a divorce from appellant on the ground of extreme and repeated cruelty, and further asked that a certain piece of property standing in the name of the appellant be decreed to be hers in equity and good conscience, and that appellant convey the legal title to her, and that the court grant her alimony and solicitor's fees. An amended bill of complaint [illegible] was filed, to which defendant filed a demurrer. The demurrer [illegible] in the bill and has title to the property. Appellant filed a cross bill charging adultery. [illegible] cause was referred to a master, [illegible] interest in the real estate [illegible] which had been subpoenaed, [illegible] property was in [illegible] and the cross bill [illegible] balance to appellant, [illegible] and recommended the [illegible] the bill be dismissed. [illegible] the bill and cross bill, and the [illegible] extreme and repeated cruelty [illegible] tion. Afterwards, in [illegible] 1918, for the purpose [illegible] adjustment of [illegible]

and solicitor's fees. After considerable discussion, in which a number of suggestions were made, and after some evidence had been introduced in regard to appellant's financial ability, counsel for appellee said, "Here is another suggestion that I will make along a different line. * * * Let me ask Mr. Kuebler if he will take the property free of any claims on the part of the complainant, and pay her $100 a month, and she move out?" The Court: "Will you do that?" Mr. McKinley (Counsel for appellant): "We will take the property and pay $80 a month." The Court: "Well, supposing you give her $100 a month, Mr. Kuebler, and take the property." Mr. Kuebler: "All right, I will do that." The Court: "All right." The matter of solicitor's fees was then suggested. Mr. Spencer (Counsel for appellee): "I think there ought to be an allowance of $400." The Court: "I think that will be all right, if you will give him time to pay it." Mr. Kuebler: "How much?" Mr. Spencer: "$400." The Court: "And not compel him to pay it immediately." Mr. Kuebler: "I couldn't do it." Mr. Spencer: "I wouldn't expect it to be paid immediately." Mr. Kuebler: "Isn't that a little bit high, twenty days - $40 a day?" Mr. Spencer: "No, $20 a day, just one half of what it should be." Mr. Kuebler: "What is the forty days for?" Mr. Spencer: "Twenty days. I spent more time than that since I came into the case." Mr. Kuebler: "Well, I am willing to pay $400, if I can pay it in installments during the next twelve months." Later, Mr. Kuebler said, "I will let her take all of the furniture except my personal library, those books and some furniture that is in my room there now, I will let her take all the balance." The court then directed a decree to be prepared in accordance with this agreement, and, evidently relying upon it, appellee moved out of the property in controversy, thereby surrendering the homestead, and apparently preserved no exceptions to the master's

and solicitor's fees. After considerable discussion, in which a number of suggestions were made, and after some evidence had been introduced in regard to appellant's financial ability, counsel for appellee said, "Here is another suggestion which I will make along a different line. . . . Let us say Mr. Voshier if he will take the property free of any claim on the part of the complainant; and pay her $100 a month, and she move out?" The Court: "Will you do that?" Mr. Lightley (Counsel for appellant): "We will take the property and pay $50 a month." The Court: "Well, supposing you give her $100 a month, Mr. Voshier, and take the property." Mr. Voshier "All right. I will do that." The Court: "All right." The matter of solicitor's fees was then suggested. Mr. Spencer (Counsel for appellee): "I think there ought to be an allowance of $500." The Court: "I think that will be all right. If you will save him time to pay it." Mr. Voshier: "How much?" Mr. Spencer: "$500." The Court: "And not compel him to pay it immediately." Mr. Voshier: "I couldn't do it." Mr. Spencer: "I would not expect it to be paid immediately." Mr. Voshier: "That's too a little bit high, twenty days - $40 a day?" Mr. Spencer: "Mr. $40 a day, just one half of what it should be." Mr. Voshier: "Not in the twenty days form" Mr. Spencer: "Twenty days. I guess more time than that either; come into the case." Mr. Voshier "Well, I am willing to pay $400, if I can have it in installments during the next twelve months." Later, Mr. Voshier said, "I will let her take all of the furniture except my personal library, those books and some curtains that is in my room there now, I will let her take all the furniture." The Court then directed a decree to be prepared in accordance with the agreement, and. evidently satisfied upon the question of the property in controversy, thereby overruling the testimony, and apparently treasured no exception to the rulings

report which found in favor of appellant's title. Afterwards, on July 27, 1915, the decree was presented in court, and appellant, for the first time, presented objections to the provisions in regard to alimony and solicitor's fees, which he had already expressly agreed to, on the ground that both were excessive, unreasonable, and beyond the financial ability of the appellant. While this was presented before the decree was entered, it was presented in the form of a motion made after entry of the decree, and after motion for an appeal had been allowed. He also asked to have taken into account the fact that appellee had removed the household furniture, although he had expressly authorized it, and objected to the payment of the master's fee, although this had been taken into consideration at the time the agreement was made. He presented certain statements in regard to his assets, liabilities, income, and expenses, together with certain answers to a rule to show cause entered in connection with the allowance of temporary alimony and solicitor's fees.

While it is always within the power of the court to modify a decree for alimony on account of the changed circumstances of the parties, there is nothing in this record which shows that their circumstances had in any way changed between the time when the court fixed the terms of the decree in accordance with appellant's agreement, and the time when his motion for a modification of the decree was made, except that he had, in the mean time, received the benefit of a surrender of the premises which appellee had been occupying up to that time as a homestead. A court of chancery cannot permit a party to enter into an agreement in regard to the terms of a decree, and after receiving the benefit to be derived from it, repudiate it. Had the terms in regard to the alimony been fixed on evidence alone, it still would have required a very strong showing on the part

report which found in favor of appellant's title. Afterwards, on July 17, 1918, the decree was presented in court, and appellant, for the first time, presented objections to the provisions in regard to attorney and notaitor's fees, which he had already expressly agreed to, on the ground that both were excessive, unreasonable, and beyond the financial ability of the appellant. While this was presented before the decree was entered, it was presented in the form of a motion made after entry of the decree, and after motion for an appeal had been allowed. He also asked to have taken into account the fact that appellee had removed the homestead structure, although he had expressly authorized it, and objected to the payment of the master's fee, although this had been taken into consideration at the time the agreement was made. He presented certain statements in regard to his assets, liabilities, income, and expenses, together with certain answers to a suit to show cause entered in connection with the alleged acts of improper attorney and notaitor's fees.

While it is always within the power of the court to modify a decree for alimony on account of the changed circumstances of the parties, there is nothing in this record which shows that such circumstances had in fact occurred between the time when the court fixed the terms of the decree in accordance with appellant's agreement, and the time when his motion for a modification of the decree [illegible], except that he had, in the meantime, received the [illegible] of a [illegible] of the premises which appellee had left on hand, up to the time he [illegible] a homestead. [illegible] of character [illegible] entered into an agreement in regard to the [illegible] homes, and after receiving the benefit to be derived from it, repudiated it. Had the terms in regard to the alimony been fixed on evidence alone, it still would have required a very strong showing on the part

of the appellant to justify a change in the terms based upon facts in existence at the time of the hearing. But the present case is much stronger, for appellant has, by his express agreement, forever estopped himself from asserting that the terms to which he agreed were not at that time just and reasonable. The facts in regard to his own circumstances were peculiarly within his own personal knowledge, and the sources of information from which he claims to have compiled the statements were as entirely within his control at the time he made the agreement, as they were at the time the decree was entered.

We are therefore of the opinion that the court did not err in entering a decree in accordance with the agreement of appellant entered into in open court, June 5, 1915. The decree of the Circuit Court is affirmed.

AFFIRMED.

of the appellant to justify a change in the same based upon facts in existence at the time of the hearing. But this present case is such a concern. For appellant has, by his express argument, focused nature a benefit from asserting that the terms to which he agreed were not at that time just and reasonable. The facts in regard to the two circumstances were peculiarly within his own personal knowledge, and the sources of information from which he claims to have compiled the statements were as readily within his control at the time he made the agreement, as they were at the time the decree was entered.

We are therefore of the opinion that the court did not err in ordering a decree in accordance with the agreement of appellant entered into in open court, June 4, 1920. The decree of the Circuit Court is affirmed.

261 - 22695.

EFFIE C. KUEBLER, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT,
GEORGE J. KUEBLER, Appellant.	)	COOK COUNTY.

204 I.A. 258

MR. JUSTICE GOODWIN delivered the opinion of the court.

This is an appeal from an order of the Circuit Court that the appellant pay appellee the sum of $100.00 a month for her support, pending the appeal taken from the original decree, and certain sums on account of the amount for which he was in arrears under the original decree, and the further sum of $200.00 to enable her to employ counsel. The contention of appellant is that the allowance is not justified by the circumstances of the parties. He relies, first, upon the evidence introduced by appellant at the time the original decree was entered, which was reviewed in Kuebler v. same, Opinion No. 21883. It will be noted that that evidence included appellant's affidavit in regard to his expenses and disbursements covering a period of seventy-nine months prior to the entry of the original decree. At the time it was offered, there was no cross-examination of appellant in regard to the accuracy and completeness of the statement, and no countervailing proof, for the reason that none was required, since the decree was entered in accordance with an agreement upon the part of the appellant, made at a time when his sources of information in regard to his ability to pay were quite as good as when the decree was entered. It will be recalled also that one consideration for appellant's agreement in regard to alimony and solicitor's fees was the surrender of certain property which appellee was occupying as a homestead, and the relinquishment of all of appellee's claim of title to the property itself. Appellant admits that while the encumbrance upon this place amounted to $3,000, he

521 - 20094.

HENRY C. HUSEMAN, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT
GEORGE J. HUSEMAN, Appellant.	)	COOK COUNTY.

20 A.L.R. 253

MR. JUSTICE CONDON delivered the opinion of the court:

This is an appeal from an order of the Circuit Court that the appellant pay appellee the sum of $100.00 a month for her support, pending the appeal taken from the original decree, and certain sums on account of the amount for which he was in arrears under the original decree, and the further sum of $200.00 to enable her to prosecute the contention of appellant, that the allowance is not justified by the circumstances of the parties. The relief, upon the evidence introduced by appellant at the time the original decree was entered, which was reviewed in Huseman v. Same, Opinion No. [illegible], it will be noted that that evidence included appellant's efficient [illegible] to his employee and [illegible] a period of [illegible] months prior to the entry of the original decree. [illegible] time it was offered, there was a [illegible] of about [illegible] in excess of the accounting [illegible] statement, and no corroborating proof, [illegible] was mentioned, [illegible] and a mortgage [illegible] [illegible], made [illegible] when the courses of [illegible] [illegible] may well [illegible] will be reasonable [illegible] appreciate [illegible] [illegible] automobile of [illegible] [illegible] a horseshed, and [illegible] [illegible] state of title to [illegible] property [illegible] while the counsel [illegible] upon [illegible]

had formerly held it at a valuation of $6,500, although he was unable to obtain that, or the sum of $6,000 for it.

It appeared in the proceeding before the master in this case, that after the entry of the decree, the appellant was sued by his brother for what was claimed to be the joint debt of himself and appellee. Appellant permitted himself to be defaulted, and actively assisted his brother in the trial of the case against appellee, in which the jury found in her favor. Appellant, however, turned the real estate in question over to his brother in satisfaction of the judgment thus obtained against him by default, and the master, very properly, we think, found that appellant had unnecessarily disposed of his interest in the property.

In view of this circumstance, and the other evidence disclosed in the record, we are of the opinion that the court's orders in regard to alimony and solicitor's fees cannot be said to be unsupported by the evidence in regard to the circumstances of the parties. The order of the Circuit Court is affirmed.

AFFIRMED.

had formerly held it as a valuation of $4,000, although he was unable to obtain that, or the sum of $2,000 for it.

It appeared in the proceeding before the master in this case, that after the entry of the decree, the appellant was sued by his brother for what was claimed to be the joint debt of himself and appellee. Appellant permitted himself to be defaulted, and actively resisted his brother in the trial of the case against appellee, in which the jury found in her favor. Appellant, however, turned the real estate in question over to his brother in satisfaction of the judgment thus obtained against him by default, and the master very properly, we think, found that appellant has unnecessarily disposed of his interest in the property.

In view of this circumstance, and the other evidence disclosed in the record, we are of the opinion that the court's order in regard to alimony and solicitor's fees cannot be said to be unsupported by the evidence. We remand to the chancery court in accordance of the opinion of the Mississippi Court in [illegible].

- 22986.

EFFIE C. KUEBLER, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT,
GEORGE J. KUEBLER, Appellant.	)	COOK COUNTY.

204 I.A. 259

MR. JUSTICE GOODWIN delivered the opinion of the court.

Appellant appeals from an order entered September 22, 1916, committing him for contempt for failing to comply with the order for an allowance for suit money and solicitor's fees, entered April 12, 1916. The appeal last mentioned was decided in Kuebler v. Kuebler, Opinion No. 22695. In passing upon the action of the chancellor in committing appellant for contempt, it must be remembered that the chancellor had before him the facts recited in the opinions filed in Kuebler v. Kuebler, No. 21883, and Kuebler v. Kuebler, No. 22695. In view of those facts we are of the opinion that the court was justified in finding against the appellant upon the question of his ability to comply with the terms of the order of April 12, 1916, notwithstanding his affidavit in which he states, among other things, "that his income has been insufficient to meet his necessary office expenses, maintain his practice and live respectably, and comply with said order."

From the records before us it appears that appellant, after having once agreed upon the amount of solicitor's fees and alimony, and receiving the benefit of the decree, has done all in his power to prevent appellee from receiving the sums to which the court had decreed that she was entitled, and we also feel that the court is justified in considering that the action of appellant in transferring the real estate in question to his brother, and assisting the latter in his suit against appellee, was taken for that purpose. It will be noted, also, that in his attempts to render the decree of the Circuit

- 22022.

MARIE C. MURPHY, Appellee.	)	APPEAL FROM
vs.	)	CHARLES COUNTY.
GEORGE J. MURPHY, Appellant.	)	UPON ENTRY.

204 I.A. 259

[illegible]. JUDICIAL COUNCIL delivered the opinion of the court.

Appellant appeals from an order entered September 2, 1916, committing him for contempt for failing to comply with the order for an allowance for suit money and notwithstanding been entered April 10, 1916. The appeal last mentioned was decided in Lindner v. Lindner, opinion No. 22022. In deciding upon the action of the chancellor in committing appellant for contempt, it must be remembered that the chancellor had before him the facts recited in the opinion filed in Lindner v. Lindner, No. 21888, and Lindner v. Lindner, No. 22022. In view of those facts we are of the opinion that the court was justified in finding against the appellant upon the question of a willingness to comply with the terms of the order of April 10, 1916, notwithstanding his attitude in which [illegible] and other things, "that he knows he has been [illegible] of his necessary office [illegible] reasonably, and [illegible] well know."

From the records before us it appears that appellant, after having one [illegible] upon the merits of appellee's case and attorney, and possessing the benefit of their services, has done all in his power to prevent a decision from [illegible] the issue in which the court has ordered that [illegible]. And we also feel that [illegible] contemplating that the action of appellant is [illegible] the [illegible] question of his [illegible] and [illegible] in [illegible] similar appellee, [illegible] for [illegible]. [illegible] also, that in [illegible] the [illegible] usual

Court ineffectual, he has presented records to this court in three cases, which aggregate over one thousand pages. The pertinency of this fact is suggested by the ruling of our Supreme Court in Barclay v. Barclay, 184 Ill. 471, where the court, in sustaining the order committing the appellant for contempt, and in holding that the defendant had not sufficiently established his inability to perform the decree, commented upon the fact that he had chosen "to spend large sums of money in resisting payments rather than to apply the same in the discharge of his liability."

We are of the opinion that, in view of all the facts disclosed by the record, the court did not err in finding the appellant guilty of contempt. The order of the Circuit Court is, therefore, affirmed.

ORDER AFFIRMED.

Court ineffectual, he has presented records to this court in three cases, which aggregate over one thousand pages. The precedency of this task is suggested by the ruling of our Supreme Court in Bowlby v. Bowlby, 164 Ill. 471, where the court, in sustaining the order committing the appellant for contempt, and in holding that the defendant had not sufficiently established his inability to perform the decree, commented upon the fact that he had chosen "to spend large sums of money in resisting payments rather than to apply the same in the discharge of his liability."

We are of the opinion that, in view of all the facts disclosed by the record, the court did not err in finding the appellant guilty of contempt. The order of the Circuit Court is, therefore, affirmed.

AFFIRMED.

361 - 21758

HATTIE PROCTOR, Appellee, vs. W. F. RHORBECK, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is a suit for damages brought by Hattie Proctor, appellee, for unlawful eviction and loss of goods and chattels, against W. F. Rhorbeck, appellant.

The first count of the declaration alleges that appellant on September 15th, 1911, entered the flat of appellee and with force and arms took away her goods and chattels to the value of $2,000. The second count alleges that appellant expelled appellee and her family from said flat and kept them expelled.

Appellant filed a plea of not guilty, and a special plea, that appellee several days prior to the time mentioned in the declaration had informed appellant that she had rented another flat, and that she had moved her chattels.

The jury brought in a verdict for the sum of $500. The court remitted $150 and entered a judgment for $350.

361 - 21752

HATTIE PROCTOR, Appellee,	APPEAL FROM
vs.	SHERMAN COUNTY,
W. H. HORNBROOK, Appellant.	COOK DISTRICT.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is a suit for damages brought by Hattie Proctor, appellee, for unlawful eviction and loss of goods and chattels, against W. H. Hornbook, appellant.

The first count of the declaration alleges that appellant on September 15th, 1911, entered the flat of appellee and with force and arms took away her goods and chattels to the value of $4,000. The second count alleges that appellant expelled appellee and her family from said flat and kept them expelled.

Appellant filed a plea of not guilty, and a special plea, that appellee abandoned the premises prior to the time mentioned in the declaration and leased another flat, that she had taken another flat, and that she had moved her chattels.

The jury brought in a verdict for the sum of $500. The court remitted $100 and entered a judgment for $400.

It appears ~~from the evidence~~ that ~~appellee~~ plaintiff-appellee had leased the flat in question from ~~appellant~~ defendant; that the lease had not expired; that the rent had been paid in advance; that no notice had been given by the owner terminating the lease; that ~~appellee~~ plaintiff was in lawful possession, when without notice of any kind ~~appellant~~ defendant entered and removed the goods and chattels of ~~appellee~~ plaintiff to the value of $390.59 and put a stranger in possession. The evidence also shows that ~~appellee~~ plaintiff made several efforts to get into the premises, but was kept locked out; that numerous efforts were made by her to find where her goods had been taken; ~~that she and the witness Reynolds callad at appellant's office on the Monday following the 16th of September and offered the month's rent to Wolff, the agent, which he refused, telling her to see appellant;~~ and that all of the goods in question were lost to her without any compensation.

The main contentions of appellant are as follows:

1. Appellant had nothing to do with dispossessing appellee.

2. Appellee intended giving up the premises on Sept. 16th, and having so informed appellant at his office, it amounted to a surrender of the lease.

3. Nothing was done by appellee to get possession of her chattels from which results would have been expected.

4. The court erred in giving the 4th instruction for appellee and in refusing to give the 5th and 6th and eighth of appellant's instructions.

As to the first contention. We find that appellant testified that on September 16th he told the new tenant he would go over and see if he could get the

It appears from the evidence that appellee had leased the flat in question from appellant; that the lease had not expired; that the rent had been paid in advance; that no notice had been given by the owner terminating the lease; that appellee was in lawful possession, when without notice of any kind appellant entered and removed the goods and chattels of appellee, to the value of $300.00 and put a stopper in possession. The evidence also shows that appellee made several efforts to get into the premises, but was kept locked out; that numerous efforts were made by her to find where her goods had been taken; that she was the witness Heymolds called at appellant's office on the morning following the 10th of September and offered the rights rent to Wolff, the agent, which he refused, telling her to see appellant; that all of the goods in question were lost to her without any compensation."

The main contentions of appellant are as follows:

1. Appellant had nothing to do with dispossessing appellee.

2. Appellee returned with an execution of the court. Wolff, our servant, informed appellee of his office, it appeared a stranger of the lease.

3. Nothing was done by appellant to get possession of her chattels from another vacant room, as was expected.

4. The court erred in giving the instruction for appellee and in refusing to give the instruction of appellant's instructions.

As to the first contention, it is appellant testified that on September 15th, the new tenant had moved in over and her if he had gone

key to let her get possession of the flat. At that time her moving men were waiting with a van loaded with her furniture and found the door locked. They did not wait for appellant, but got in with the aid of a gas inspector's key. Nearly all of the stranger's goods had been put in when appellant arrived.

A day or two afterwards, he was present when appellee's goods were moved and directed the men that moved them. Under the circumstances it may be safely presumed that appellant was fully aware of the eviction and removal of appellee's goods.

As to the second contention. Appellant testified that on the 8th or 10th of September appellee "came to the office and said she had decided to give up the flat." Yet he testified later on that he "never saw her until yesterday", the time of the trial. Evidently the above statement was not made to him, and appellee denies making any such remark to him. As no evidence was offered to corroborate his testimony on this question, it fails to establish his claim. In any event, it would not excuse the forcible removal and subsequent loss of her goods, under the circumstances.

As to the third contention. The argument that appellee did nothing to prevent the loss of her goods is not established by the evidence. She tried several times to get into the flat and found it locked. She says she went there "four or five times and never received an answer". She finally took a police officer on September 16th with her to get her goods and he was denied admission. The officer then went to appellant's home to see

key to let her get possession of the flat. At that time her moving men were waiting with a van loaded with her furniture and found the door locked. They did not wait for appellant, but got in with the aid of a gas inspector's key. Nearly all of the stranger's goods had been put in when appellant arrived.

A day or two afterwards, he was present when appellee's goods were moved and directed the men that moved them. Under the circumstances it may be safely presumed that appellant was fully aware of the eviction and removal of appellee's goods.

As to the second contention. Appellant testified that on the 8th or 10th of September appellee "came to the office and said she had decided to give up the flat." Yet he testified later on that he "never saw her until yesterday", the time of the trial. Evidently the above statement was not made to him, and appellee denies making any such remark to him. As no evidence was offered to corroborate his testimony on this question, it fails to establish his claim. In any event, it would not excuse the forcible removal and subsequent loss of her goods, under the circumstances.

As to the third contention. The argument that appellee did nothing to prevent the loss of her goods is not established by the evidence. She tried several times to get into the flat and found it locked. She says she went there "five or five times and never received an answer". She finally took a police officer on September 15th with her to get her goods and he was denied admission. The officer then went to appellant's home to see

if he could get any information, and was refused admission, and was sent away with an insulting epithet from appellant's wife. He testified, "I went to Mr. Rohrbeck's house, spoke to him through the door, but he did not answer me." The officer says he finally called at the real estate office and on Wolff, the agent, who told him he could have the goods by paying storage on them. There is no evidence that appellant made any effort to put appellee in possession of them.

As to the fourth contention. The objection made to appellee's fourth instruction is not well taken, for the reason shown above, that the evidence is insufficient to prove appellee gave notice of quitting the premises. The instruction of appellant was properly refused by the court.

The eighth instruction, "that plaintiff cannot recover vindictive damages in this case when there are no circumstances indicating insult or indignity" shown, conflicts with the decisions of our Supreme Court.

> Chicago Traction Co. v. Mahoney, 230 Ill. 562; Ousley v. Hardin, 23 Ill. 352.

Finding no material error in the record, the judgment is affirmed.

AFFIRMED.

if he could get any information, and was refused admission, and was sent away with an insulting oath from appellant's wife. He testified, "I went to Mr. Holubeck's house, spoke to him through the door, but he did not answer me." The other witness is formally called at the real estate office and on Wolff, the agent, who told him he could have the goods by paying storage on them. There is no evidence that appellant made any effort to put appellee in possession of them.

As to the fourth contention. The objection made to appellee's fourth instruction is not well taken, for the reason shown above, that the evidence is insufficient to prove appellee gave notice of entering the premises. The instruction of appellant was properly refused by the court.

The eighth instruction, "that plaintiff cannot recover vindictive damages in this case when there are no circumstances indicating the "malice or insolence" shown, conflicts with the statutes and decisions.

<u>Chicago Terminal Co. v. Chase</u>, 90 Ill. [illegible];
<u>Dunlop v. Martin</u>, 15 Ill. [illegible].

Finding no reversible error in the record, the judgment is affirmed.

AFFIRMED.

55 - 22458

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

JACK LILLINGTON, alias CLARENCE STRUBLE and HENRY STEAD, alias FRED STEAD,
Plaintiff in Error.

ERROR TO CRIMINAL COURT, COOK COUNTY.

204 I.A. 273

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff in error was indicted, found guilty, and sentenced to be imprisoned for nine months and pay a fine of $500 and costs. The indictment contained three counts; first, for a felonious assault with a revolver, the same being a dangerous and deadly weapon, with intent to kill and murder; second, for assault with a loaded revolver, the same being a dangerous and deadly weapon and without any considerable provocation with intent to inflict a bodily injury; third, for assault as in the second count, except that the deadly weapon was alleged to be "a certain hard substance, a further description of which is unknown". The verdict of the jury was as follows:

> We, the jury, find the defendant * * * guilty of assault with a deadly weapon in manner and form as charged in the indictment and we further find that said assault was committed with an intent to inflict upon the person of another a bodily injury where no considerable provocation appears and the circumstances of the assault show an abandoned and malignant heart."

It is contended by the plaintiff in error; first, that the verdict authorized a conviction for

55 - 86605

THE PEOPLE OF THE STATE OF IDAHO,

Defendant in Error,

vs.

JACK DILLINGTON, alias CLARENCE STRUBLE and HENRY STRAD, alias HEND STRAD,

Plaintiff in Error.

ERROR TO

CRIMINAL COURT,

ADA COUNTY.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff in error was indicted, found guilty, and sentenced to be imprisoned for nine months and pay a fine of $500 and costs. The indictment contained three counts: first, for a felonious assault with a revolver, the same being a dangerous and deadly weapon, with intent to kill and murder; second, for assault with a loaded revolver, the same being a dangerous and deadly weapon and without any considerable provocation with intent to inflict a bodily injury; third, for assault as in the second count, except that the deadly weapon was alleged to be "a certain hard substance, a further description of which is unknown". The verdict of the jury was as follows:

> We, the jury, find the defendant * * * guilty of assault with a deadly weapon in manner and form as charged in the first count and we further find that said assault was committed with an intent to inflict upon the person of another a bodily injury where no considerable provocation appears and the circumstances of the assault show an abandoned and malignant heart.'

It is contended by the plaintiff in error:

First, that the verdict authorized a sentence for

simple assault only; second, that the verdict was not supported by the evidence; third, that the court erred in giving instruction number two.

After a careful examination of the record we are of the opinion that the verdict sufficiently specifies the material facts constituting the crime of assault with a deadly weapon and that the words "of another" do not negative the allegation, that the intention was to injure Elizabeth Whipple, but were used in direct reference to her. The People v. Leman, 231 Ill. 197. The words "of another" which occur in the course of the phraseology of the verdict were evidently used to distinguish the one upon whom the assault was made from the one committing the assault; and further, the words in the verdict "as charged in the indictment" clearly designate that the one upon whom the assault was made was the one charged in the indictment, that is, Elizabeth Whipple.

The verdict is good either with reference to the second count which charges that the plaintiff in error assaulted Elizabeth Whipple with a revolver charged with gun powder and leaden bullets, the same being a deadly and dangerous weapon, or as to the third count, which is the same as the second count except that the deadly weapon is alleged to be "a certain hard substance, a further description of which is unknown."

Considering the verdict with reference to the second count, the jury was justified by reason of the testimony of Elizabeth Whipple to the effect that Lillington, alias Struble, pointed a revolver at her head and said: "Get out of here you --- or I will blow your brains out",

simple assault only; second, that the verdict was not supported by the evidence; third, that the court erred in giving instruction number two.

After a careful examination of the record we are of the opinion that the verdict sufficiently considering the material facts constituting the crime of assault with a deadly weapon and that the words "of another" do not negative the allegation, that the intention was to injure Elizabeth Whipple, but were used in direct reference to her. The People v. Lemon, 231 Ill. 107. The words "of another" which occur in the course of the phraseology of the verdict were evidently used to distinguish the one upon whom the assault was made from the one committing the assault; and further, the words in the verdict "as charged in the indictment" clearly designate that the one upon whom the assault was made was the one charged in the indictment, that is, Elizabeth Whipple.

The verdict in good citizen with reference to the second count which charges that the defendant in error assaulted Elizabeth Whipple with a revolver charged with gun powder and leaden bullets, the same being a deadly and dangerous weapon, or as it is stated thus, which is the same as the second count except that the deadly weapon is alleged to be "a certain hard substance, - instrument - description of which is unknown."

Considering the verdict with reference to the second count, the jury was justified by reason of the testimony of Elizabeth Whipple to the effect that Lil Lincoln, alias Stubbs, pointed a revolver at her head and said: "Get out of here you --- or I will blow your brains out",

in concluding that the revolver was loaded.

The verdict would also be good when considered in reference to the third count inasmuch as the revolver was introduced in evidence and the jury had an opportunity to determine whether or not the revolver in question was a hard substance as set out in the indictment.

Plaintiff in error contends that the court erred in giving instruction number 2. The record shows that the jury were instructed as a matter of law, not only on the charge of assault with a deadly weapon, but also on the charge of assault with the intention to commit murder and simple assault. We are of the opinion that the evidence in the case clearly justified the court in giving instruction number 2 as to what constituted the crime of assault with a deadly weapon of which the plaintiff in error was found guilty.

It is claimed by the plaintiff in error that the verdict was not supported by the evidence; that it was not shown that the revolver was not used as a bludgeon; that it was not shown that it was loaded as charged in the second count of the indictment; that there was no proof that Stead used a deadly weapon or had any intention of harming Elizabeth Whipple with a weapon and that there was no evidence of an intention to inflict a bodily injury on Elizabeth Whipple.

We are of the opinion, however, that the evidence, bearing in mind particularly the testimony of Elizabeth Whipple, which was corroborated in part, at least, by a number of other witnesses, justified the verdict. The

in concluding that the revolver was loaded.

The verdict would also be good when considered in reference to the third count inasmuch as the revolver was introduced in evidence and the jury had an opportunity to determine whether or not the revolver in question was a bona substance as set out in the indictment.

Plaintiff in error contends that the court erred in giving instruction number 2. The record shows that the jury were instructed as a matter of law, not only on the charge of assault with a deadly weapon, but also on the charge of assault with the intention to commit murder and simple assault. We are of the opinion that the evidence in the case clearly justified the court in giving instruction number 2 as to what constituted the crime of assault with a deadly weapon of which the plaintiff in error was found guilty.

It is claimed by the plaintiff in error that the verdict was not supported by the evidence; that it was not shown that the revolver was not used as a blackjack; that it was not shown that it was loaded as charged in the second count of the indictment; that there was no proof that Steed used a deadly weapon or had any intention of striking Elizabeth Tolpole with a weapon and that there was no evidence of an intention to inflict a bodily injury on Elizabeth Whipple.

We are of the opinion, however, that the evidence, bearing in mind particularly the testimony of Elizabeth Whipple, which was corroborated in part, at least, by a number of other witnesses, justified the verdict. The

claim of the plaintiff in error that the sentence was excessive is, in our opinion, untenable.

The judgment of the trial court and the verdict of the jury is, therefore, affirmed.

AFFIRMED.

claim of the plaintiff in error that the sentence was excessive is, in our opinion, untenable.

The judgment of the trial court and the verdict of the jury is, therefore, affirmed.

AFFIRMED.

248 - 22682

HARRY A. BIOSSAT,
Defendant in Error,

vs.

B. S. LIPPINCOTT,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

204 I.A. 283

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit on an account assigned to him by John J. Sweet, on which Sweet claimed an indebtedness from defendant for repairing a hotel and some cottages near Ingleside, Illinois, at an agreed price of $400, which work, it was said, was completed and accepted by the defendant in May, 1913. The account was assigned by Sweet to plaintiff on September 9, 1915. Upon trial by the court plaintiff had judgment for $350.

The crux of this controversy is as to the contract between Sweet and the defendant. If Sweet's version of the same, as presented by plaintiff's counsel, is established by the evidence it cannot reasonably be said that he has not substantially complied with it; on the other hand, if the contract was as claimed by the defendant, it is proven by the evidence that it was not substantially complied with.

Defendant is the owner of the Lippincott Hotel, with five cottages adjacent, near Ingleside, Illinois. In the spring of 1913 he wished to have some repairing done on these houses. To this end he first had some negotiations with a Mr. Spikings, who drew a plat indicating the work that was to be done. As Spikings could not do the work for some time, and the defendant was in somewhat of a hurry, negotiations were commenced with Mr. Sweet. The defendant

HENRY A. BIOSSAT, Defendant in Error,	ERROR TO MUNICIPAL COURT OF CHICAGO.
vs.	
E. E. LIPPINCOTT, Plaintiff in Error.	

MR. PRESIDING JUSTICE McSURLY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit on an account assigned to him by John J. Sweet, on which Sweet claimed an indebtedness from defendant for repairing a hotel and some cottages near Ingleside, Illinois, at an agreed price of $400, which work, it was said, was completed and accepted by the defendant in May, 1912. The account was assigned by Sweet to plaintiff on September 2, 1912. Upon trial by the court plaintiff had judgment for $352.

The crux of this controversy is as to the contract between Sweet and the defendant. If Sweet's version of the same, as presented by plaintiff's counsel, is established by the evidence it cannot reasonably be said that he has not substantially complied with it; on the other hand, if the contract was as claimed by the defendant, it is proven by the evidence that it was not substantially complied with.

Defendant is the owner of the Ingleside hotel, with five cottages adjacent, near Ingleside, Illinois. In the spring of 1912 he wished to have some repairing done on these houses. To this end he first had some negotiations with a Mr. Spikings, who drew a plat indicating the work that was to be done. As Spikings could not do the work for some time, and the defendant was in somewhat of a hurry, negotiations were commenced with Mr. Sweet. The defendant

left the plat showing the repairs with Mrs. Cirkle, the tenant of the hotel; Sweet and Mrs. Cirkle inspected the premises as to the contemplated work. Afterwards Sweet had a conversation with defendant over the telephone, in which the price of $400 was agreed upon. Defendant claims that Sweet undertook to make the repairs indicated upon the plat; Sweet says that he was to do only the work pointed out by Mrs. Cirkle and that "we were not to go by that plat; that was not the contract."

The evidence tending to support the defendant's theory as to the contract is that he left the plat with Mrs. Cirkle to be shown to Sweet when he came to figure on the work; that at the time of Sweet's interview with Mrs. Cirkle she called his attention to the plat. Sweet testified, "She handed it to me and we looked it over, and in the conversation she said, 'you have to follow that.'" She also gave him the plat, which he took away with him. This is corroborated by Mrs. Cirkle. It is also corroborated by the testimony of the defendant, who says that in his telephone conversation with Sweet he inquired if Sweet had figured on everything, to which he replied that he had. Sweet kept the plat but did not deliver it to any of the workmen who were sent to do the work, nor inform them of its contents, and he himself did not go near the work until after his men had withdrawn.

It is sought by the plaintiff to ignore the repairs indicated by the plat, and to confine himself only to those things which he says were pointed out to Sweet by Mrs. Cirkle.

We have reached the conclusion that the clear preponderance of the evidence proves that the plat, with the figures and marks thereon, was the basis of the contract.

left the city during the remarks when Mr. Gibbie, the tenant of the hotel; Sweet and Mrs. Gibbie discussed the premises as to the contemplated work. Afterwards Sweet had a conversation with defendant over the telephone, in which the price of $400 was agreed upon. Defendant claims that Sweet undertook to make the repairs indicated upon the plat; Sweet says that he was to do only the work pointed out by Mrs. Gibbie and that "we were not to go by that plat; that was not the contract."

The evidence tending to support the defendant's theory as to the contract is that he left the plat with Mrs. Gibbie to be shown to Sweet when he came to figure on the work; that at the time of Sweet's interview with Mrs. Gibbie she called his attention to the plat. Sweet testified, "She handed it to me and we looked it over, and in the conversation she said, 'you have to follow that.'" She also gave him the plat, which he took away with him. This is corroborated by Mrs. Gibbie. It is also corroborated by the testimony of the defendant, who says that in his telephone conversation with Sweet he inquired if Sweet had figured on everything, to which he replied that he had. Sweet kept the plat but did not deliver it to any of the workmen who were sent to do the work, for lack of time or opportunity, and he merely did not go [illegible] until after the work had withdrawn.

It is seen by the plaintiff's witnesses that the repairs indicated by the plat, on the building matters [illegible] those that [illegible] were [illegible] one [illegible] Gibbie.

We have searched the conflicting evidence [illegible] preponderance of the evidence proves that [illegible] the figures and marks thereon, was the basis [illegible] contract.

It certainly was so understood by the defendant in his telephone conversation with Sweet, in which Sweet's offer was accepted, and the only reasonable inference from the testimony of both of Sweet and Mrs. Cirkle was that Sweet himself had in mind the work indicated on the plat. It is unreasonable to say that Sweet was undertaking to do only what Mrs. Cirkle verbally pointed out, without any definite statement as to what this was. It is patent that the plat was used both by Mrs. Cirkle and Sweet and that the work "pointed out" had reference to the work shown on the plat and its location on the buildings.

It is not contended by plaintiff that Sweet complied in any substantial way with the work shown by the plat. Among other items was a considerable number of new posts under the porches; only a few new posts were put in by Sweet. At other points, where the plat indicated that new lumber should be used, Sweet used old lumber. It is unnecessary to note other details called for by the plat which were not performed by Sweet. There was evidence tending to show that it was necessary to do all of this work over again the following year. It was also shown that the defendant, after Sweet's workmen had been working for about three days, finding that it was not being done as agreed upon, ordered that the work be stopped but that Mr. Sweet paid no attention to this order.

Plaintiff has not sued upon a quantum meruit, and there is no evidence to support such a claim; the suit is brought upon a contract for an agreed sum, and unless substantial compliance has been shown plaintiff cannot recover. Keeler v. Herr, 157 Ill. 57.

Holding, as we do, that plaintiff has failed to show the performance of the contract proven to have been the contract entered into between Mr. Sweet and the defendant, the judgment is reversed without remanding.

REVERSED.

It certainly was so understood by the defendant in his telephone conversation with Sweet, in which Sweet's offer was accepted, and the only reasonable inference from the testimony of both of Sweet and Ara. Clearly was that Sweet himself had in mind the work indicated on the plat. It is unreasonable to say that Sweet was undertaking to do only what Ara. Clarkie verbally pointed out, without any definite statement as to what this was. It is patent that the plat was used both by Ara. Clarkie and Sweet and that the work "pointed out" had reference to the work shown on the plat and its location on the buildings.

It is not contended by plaintiff that Sweet complied in any substantial way with the work shown by the plat. Among other items was a considerable number of new posts under the porches; only a few new posts were put in by Sweet. At other points, where the plat indicated that new lumber should be used, Sweet used old lumber. It is unnecessary to note other details called for by the plat which were not performed by Sweet. There was evidence tending to show that it was necessary to do all of this work over again the following year. It was also shown that the defendant, after Sweet's workmen had been working for about three days, finding that it was not being done as agreed upon, ordered that the work be stopped and that Sweet paid no attention to this order.

Plaintiff has not sued upon a quantum meruit, and there is no evidence to support such a claim; the suit is brought upon a contract for an agreed sum, and unless substantial compliance has been shown plaintiff cannot recover. Keeler v. Herr, 157 Ill. 57.

Holding, as we do, that plaintiff was limited to show the performance of the contract proven to have been the contract entered into between Ir. Sweet and the defendant, the judgment is reversed without remanding.

REVERSED.

251 - 22685

FRANK A. VICKERS, trading as F. A. Vickers & Co.,
Appellee,

vs.

W. W. VAUGHAN COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

204 I.A. 284

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in attachment against the defendant for $101.15. The affidavit for attachment alleged the nonresidence of the defendant and an indebtedness of $107 upon an open account for commissions, as agent, for the procuring of purchasers for the sale of merchandise shown by an itemized statement attached. Defendant admitted that there was due to the plaintiff upon certain of these items the sum of $31.25, which was tendered and paid into court. The question in controversy is whether there is anything due on the alleged sale of merchandise, that is, tomato catsup, to Steele Wedeles & Company.

The contract between the plaintiff and the defendant provides that plaintiff was to act as the agent of defendant in the sale of its products upon commission. The evidence shows that the commission was tobe paid on orders on which goods were shipped out, but that on orders canceled or not filled no commission was to be paid. Afterwards the order from Steele Wedeles & Company was obtained by the plaintiff, which order was in writing and was accepted by the defendant. It provided for the sale of 1,000 cases of pure tomato catsup, at 67½ cents per dozen, f.o.b. cars Chicago, and "subject to approval of sample of 1915 pack." It is

FRANK A. VICKERS, trading as
F. A. Vickers & Co.,
Appellee,

vs.

W. W. VAUGHAN COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in attachment against the defendant for $1,1.15. The affidavit for attachment alleged the nonresidence of the defendant and an indebtedness of $1,7 upon an open account for commissions, as agent, for the procuring of purchasers for the sale of merchandise shown by an itemized statement attached. Defendant admitted that there was due to the plaintiff upon certain of these items the sum of $33.25, which was tendered and paid into court. The question in controversy is whether there is anything due on the alleged sale of merchandise, that is, tomato catsup, to Steele Vadelas & Company.

The contract between the plaintiff and the defendant provides that plaintiff was to act as the agent of defendant in the sale of its products upon commission. The evidence shows that the commission was to be paid on orders on which goods were shipped out, but that on orders canceled or not filled no commission was to be paid. Although the order from Steele Vadelas & Company was obtained by the plaintiff, which order was in writing and was accepted by the defendant. It provided for the sale of 1,000 cases of pure tomato catsup, at $2.40 cents per dozen, f.o.b. cars Chicago, and "subject to approval of sample of 1915 pack." It is

shown by the evidence that the defendant sent to plaintiff for submission to Steele Wedeles & Co. samples of the catsup which it proposed to ship, and that both plaintiff and Steele Wedeles & Co. advised the defendant that the samples were not satisfactory; that defendant then wrote to plaintiff that they would accept the cancellation of the order and go no further in the matter. The answer was that the matter would be considered closed.

Many points are presented by the attorneys for the defendant, but we think it is sufficient to note that under the contract between plaintiff and the defendant no commissions on the Steele Wedeles order should be allowed for the reason that this order was merely conditional and subject to cancellation at the option of the buyer. The sale having been made subject to the approval of samples by the buyer, when the seller was notified that the samples were unsatisfactory and that they failed to receive the approval of the proposed purchaser, there was no obligation on either of the parties to proceed further.

In Goodwich v. Van Nortwick, 43 Ill. 45, the contract was with reference to a mill, and the agreement was that if the mill suited the purchaser he was to pay for it, otherwise not, and the court held that "if it did not suit appellee, then he had the right to return the property, and he was by the terms of the contract to be the sole judge of whether it suited him. See, also, Dvorak v. Prucha, 156 Ill. App. 514.

We do not understand the rule to be that in a contract of this sort it must be shown by the evidence that the buyer had some reasonable ground for finding the samples unsatisfactory. We should think that in an article of this

shown by the evidence that the defendant sent to plaintiff for submission to Steele Vedeler & Co. samples of the autumn which it proposed to ship, and that both plaintiff and Steele Vedeler & Co. advised the defendant that the samples were not satisfactory; that defendant then wrote to plaintiff that they would accept the cancellation of the order and go no further in the matter. The answer was that the matter would be considered closed.

Many points are presented by the attorneys for the defendant, but we think it is sufficient to note that under the contract between plaintiff and the defendant no communications on the Steele Vedeler order should be allowed for the reason that this order was merely conditional and subject to cancellation at the option of the buyer. The sale having been made subject to the approval of samples by the buyer, when the seller was notified that the samples were unsatisfactory and that they failed to receive the approval of the proposed purchaser, there was no obligation on either of the parties to proceed further.

In Goodrich v. Van Norwick, 42 Ill. 43, the contract was with reference to a mill, and the agreement was that if the mill suited the purchaser he was to pay for it, otherwise not, and the court held that if the mill not suit appellee, then he had the right to return the property, and he was by the terms of the contract to be the sole judge of whether it suited him. See, also, Dworak v. Zrucka, 158 Ill. App. 514.

We do not understand the rule to be that in a contract of this sort it must be shown by the evidence that the buyer had some reasonable ground for finding the samples unsatisfactory. We should think that in an article of this

kind, where the peculiar tastes and requirements of the trade were to be considered, the judgment of the buyer must be conclusive.

Cases cited by plaintiff with reference to the rule that where a broker brings the principals together into a binding contract which is subsequently canceled, he is nevertheless entitled to his commissions, are not in point. These cases, generally speaking, have to do with real estate transactions, and even here there are many decisions to the effect that where the contract for commissions is conditioned upon the actual consummation of the deal, which subsequently fails, the broker is not entitled to commissions. In the instant case the commissions were to be "on net results obtained," and it would be unreasonable to permit commissions on merely conditional orders which never merged into sales.

We are of the opinion that the amount tendered and paid into court, namely $31.25, is the correct amount due to the plaintiff; and the judgment of the trial court is reversed and judgment against the defendant is entered in this court for $31.25, costs to be taxed against the appellee.

REVERSED AND JUDGMENT HERE.

kind, where the peculiar tastes and requirements of the trade were to be considered, the judgment of the buyer must be conclusive.

Cases cited by plaintiff with reference to the rule that where a broker brings the principals together into a binding contract which is subsequently cancelled, he is nevertheless entitled to his commissions, are not in point. These cases, generally speaking, have to do with real estate transactions, and even here there are many decisions to the effect that where the contract for commissions is conditioned upon the actual consummation of the deal, which subsequently fails, the broker is not entitled to commissions. In the instant case the commissions were to be "on net results obtained," and it would be unreasonable to permit commissions on merely conditional orders which never merged into sales.

We are of the opinion that the amount tendered and paid into court, namely $31.25, is the correct amount due to the plaintiff; and the judgment of the trial court is reversed and judgment against the defendant is entered in this court for $31.25, costs to be taxed against the appellee.

REVERSED AND JUDGMENT HERE.

254 - 22688

JAMES F. BISHOP, Admr. Estate of ANNA TEMKIN, Deceased, Appellant,

vs.

CHICAGO CITY RAILWAY COMPANY, Appellee.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

204 I.A. 286

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages for the death of Anna Temkin, said to have been caused by one of defendant's street cars. At the conclusion of the plaintiff's evidence, upon motion of the defendant the court instructed the jury to return a verdict in favor of defendant, and judgment was entered upon such a verdict. From this plaintiff has appealed.

The only point presented as ground for reversal is the action of the court in refusing to admit a certified copy of the death certificate issued by the attending physician, supported by a section of the statute of the State of Wisconsin with reference to death certificates. We hardly feel called upon to discuss this point, for whether we should hold that these documents were competent evidence or otherwise, upon the record before us, we should be compelled to affirm the judgment.

The declaration contained four counts, with the usual allegations of care for her own safety on the part of deceased, and the negligent operation of one of the cars of defendant which ran into plaintiff's intestate and injured her so that she died. Defendant filed a plea of not guilty, and a special plea denying the ownership and control of the

JAMES F. BIRNOR, Admr. Estate of ANNA TAMKIN, Deceased,
Appellant,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE MORGAN
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages for the death of Anna Tamkin, said to have been caused by one of defendant's street cars. At the conclusion of the plaintiff's evidence, upon motion of the defendant the court instructed the jury to return a verdict in favor of defendant, and judgment was entered upon such a verdict. From this plaintiff has appealed.

The only point presented as ground for reversal is the action of the court in refusing to admit a certified copy of the death certificate issued by the attending physician, supported by a section of the statute of the state of Wisconsin with reference to death certificates. We hardly feel called upon to discuss this point, for whether we should hold that these documents were competent evidence or otherwise, upon the record before us, we should be compelled to affirm the judgment.

The declaration contained four counts, with the usual allegations of care for her own safety on the part of deceased, and the negligent operation of one of the cars of defendant which ran into plaintiff's intestate and injured her so that she died. Defendant filed a plea of not guilty, and a special plea denying the ownership and control of the

street railway or the car in question. There was no evidence whatever introduced tending to support either the allegation concerning the deceased's care, the negligence of the defendant or its ownership of the car. The only thing said by anyone concerning the manner of the accident is contained in a stipulation as to what a certain witness would testify were he present. It is unnecessary to analyze this stipulation, for it is so ambiguous and uncertain as to give very little, if any, information as to the occurrence; it cannot possibly be claimed to support those things which the plaintiff in an action of this sort is bound to prove.

For the reason that there was no evidence to go to the jury, it was proper for the court peremptorily to instruct the jury to find for the defendant.

While it is not necessary to our decision, we feel free to say that we are of the opinion that the exclusion of the documents presented on behalf of plaintiff was not error. The fact that plaintiff's intestate died on the date shown by the offered certificate was admitted by defendant's counsel. The physician's certificate also contained a statement that the cause of death was that the intestate had been run over by a street car. The accident took place in Chicago on October 14, 1912; the physician signing the certificate attended the intestate from January 28th to January 28th, 1913, in Wisconsin; manifestly any statement made by him as to the accident would be merely hearsay.

In Howard v. Illinois Trust & Savings Bank, 189 Ill. 568, it was said, in substance, that only those parts of official registers should be admitted which include facts within the actual knowledge of the physician making the return, the court saying, "The return is not evidence of matters of mere hearsay gathered up by the physician of which he

street railway or the car in question. There was no evidence whatever introduced tending to support either the allegation concerning the deceased's care, the negligence of the defendant or its ownership of the car. The only testimony said by anyone concerning the manner of the accident is contained in a stipulation as to what a certain witness would testify were he present. It is unnecessary to analyze this stipulation, for it is so ambiguous and uncertain as to give very little, if any, information as to the occurrence; it cannot possibly be claimed to support those things which the plaintiff in an action of this sort is bound to prove.

For the reason that there was no evidence to go to the jury, it was proper for the court peremptorily to instruct the jury to find for the defendant.

While it is not necessary to our decision, we feel free to say that we are of the opinion that the exclusion of the documents presented on behalf of plaintiff was not error. The fact that plaintiff's intestate died on the date shown by the offered certificate was admitted by defendant's counsel. The physician's certificate also contained a statement that the cause of death was that the intestate had been run over by a street car. The accident took place in Chicago on October 14, 1913; the physician signing the certificate attended the intestate from January 28th to January 30th, 1913, in December; certainly any statement made by him as to the accident would be a mere surmise.

In Rogers v. Illinois Central R. R. Co., 100 Ill. App. 388, it was held, in substance, that only those people of official positions should be admitted to testify to facts within the actual knowledge of the physician making the return, the court saying, "The return is not evidence of matters of more hearsay gathered up by the physician of which he

knows nothing."

A large number of cases support the contention of the defendant that death certificates ate not admissible for the purpose of showing some collateral fact as the cause of death; among such cases are Metropolitan Life Ins. Co. v. Morabec, 116 Ill. App. 271; Beglin v. Metropolitan Life Ins. Co., 173 N. Y. 374; Painton v. Cavanaugh, 135 N. Y. Supp. 418; Gorham Co. v. United Engineering Co., 202 N. Y. 342; Garvan v. N. Y. C. & H. R. R. Co., 210 Mass. 275, and Pence v. Meyers, 180 Ind. 282. In Rohloff v. Aid Association for Lutherans, 130 Wis. 61, a similar certificate of death made by a physician and filed in the registrar's office was held to be incompetent on the ground that it was not the best evidence of the cause of death. Our own Supreme Court, in Novitsky v. Knickerbocker Ice Co., 276 Ill. 102, has very recently restated the rule that the verdict of a coroner's jury is not admissible for the purpose of fixing civil liability of anyone growing out of an accident resulting in death, "except in so far as the finding requirdd by the statute to be made may have such effect."

In granting the motion of the defendant the trial court acted properly, and the judgment is affirmed.

AFFIRMED.

knows nothing."

A large number of cases support the contention of the defendant that death certificates are not admissible for the purpose of showing some collateral fact as the cause of death; among such cases are Metropolitan Life Ins. Co. v. Morgan, 116 Ill. App. 271; Keslin v. Metropolitan Life Ins. Co., 172 N. Y. 374; Rainton v. Cavanaugh, 155 N. Y. Supp. 418; Gorham Co. v. United Engineering Co., 202 N. Y. 242; Garvan v. M. Y. C. & H. R. R. Co., 210 Mass. 170, and Pence v. Meyers, 180 Ind. 262. In Gohlert v. Aid Association for Lutherans, 150 Wis. 61, a similar certificate of death made by a physician and filed in the registrar's office was held to be incompetent on the ground that it was not the best evidence of the cause of death. Our own supreme Court, in Novitsky v. Knickerbocker Ice Co., 270 Ill. 102, has very recently restated the rule that the verdict of a coroner's jury is not admissible for the purpose of fixing civil liability of anyone growing out of an accident resulting in death, "except in so far as the finding required by the statute to be made may have such effect."

In granting the motion of the defendant the trial court acted properly, and the judgment is affirmed.

Affirmed.

258 - 22692

MARGARET C. McNEILL and BENJAMIN F. McNEILL,
Appellants,

vs.

RIVERS McNEILL and ELLEN M. CRUDUP,
Appellees.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

204 I.A. 287

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Complainants by their bill sought to establish a trust growing out of certain transactions between them and the defendants, who answered denying the essential allegations of the bill, invoked the Statute of Frauds as to an express trust, and averred laches in bringing the action. After hearing, the chancellor ordered the bill dismissed for want of equity. The propriety of this order is brought before us by appeal.

The complainants are husband and wife, and Benjamin F. McNeill is an older brother of the defenants, Rivers McNeill and Ellen M. Crudup; at the time of the transaction hereinafter narrated Mrs. Crudup lived in North Carolina, the other parties in Chicago.

The record shows that in May, 1898, Benjamin F. McNeill acquired a piece of land in Chicago and placed the title in the name of his wife, Margaret C. McNeill. In July, 1898, he obtained a loan of $8,000 on this property; he paid no interest, and foreclosure followed, with a sale to the mortgagees October 25, 1899, for $9,587.51. The time for complainants as mortgagors to redeem from this sale would expire on October 25, 1900. In October, and shortly before the expiration of this redemption period, Benjamin sought out his brother Rivers and solicited him to help save

MARGARET C. McNAIL and BENJAMIN
N. McNAIL,
Appellants,

vs.

RIVERS McNAIL and ELLEN R. CHUNG,
Appellees.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Complainants by their bill sought to establish a trust arising out of certain transactions between them and the defendants, who answered denying the essential allegations of the bill. Invoked the statute of frauds as to an express trust, and averred laches in bringing the action. After hearing, the chancellor ordered the bill dismissed for want of equity. The propriety of this order is brought before us by appeal.

The complainants are husband and wife, and Benjamin N. McNail is an older brother of the defendants, Rivers McNail and Ellen R. Chung; at the time of the transaction hereinafter mentioned the defendants lived in North Carolina, the other parties in Chicago.

The record shows that in May, 1928, Benjamin N. McNail acquired a lease of land in Chicago and placed the title in the name of his wife, Margaret C. McNail. In July, 1929, he obtained a loan of $4,[illegible] on this property; he paid no interest, and foreclosure followed, with a sale to the mortgagee October 23, 1930, for $[illegible]. The time for complainants as mortgagors to redeem from this sale would expire on October 23, 1931. In October, and shortly before the expiration of this redemption period, Benjamin sought out his brother Rivers and persuaded him to help save

the property from an impending total loss due to the expiration of their period of redemption. Pursuant to this Rivers had an interview with the representatives of the holders of the master's certificate, with whom he made arrangements to extend the period of redemption for one year. The defendants, to procure this extension of time, paid $3,400 of their own money, which was to apply on any redemption that the defendants might make. Benjamin and his wife were told that they must get a purchaser within that extended time, and if not, defendants would have to protect the advance of their own money by putting up the balance due under the foreclosure and obtaining the title for themselves and on their own account. The complainants were told that if this should happen they, the complainants, would have no further interest in the property. If, however, complainants should find a purchaser within the year, then all that defendants wanted was their original advance of money and expenses back, with six per cent. interest. Complainants agreed to this arrangement, and it was finally settled in its details, nearly two months after the equity of redemption of the mortgagors had ceased, in the office of Mr. Granville W. Browning, an attorney, who represented the holders of the certificate. The details of this plan were left to Mr. Browning, who required that complainants should give a quit claim deed to the defendants conveying whatever interest they might have in the property. Thereupon the defendants carried out their agreement by depositing about $3,400 with the holders of the certificate and obtaining the extension of time.

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During this extended period complainants made attempts to procure a purchaser for the property but without success. In January, 1902, there having been no sale and no redemption being made, the defendants advanced to the holders of the certificate the balance due on the certificate and obtained its transfer to themselves, and master's deeds to the property were issued to them, all of which was known to the complainants, who thereupon ceased to attempt to secure a purchaser. From this time on the defendants treated the property in all respects as their own, and complainants ceased entirely to have any connection therewith or to assert any claim of any interest therein. In January, 1911, defendants sold the property for $43,400.

For a number of years before this sale numerous letters passed between the complainants, who then lived in Grand Rapids, Michigan, and Rivers McNeill, which indicated that the complainants were in financial stress, and asking Rivers for assistance. No claims were made at any time based upon any right or interest in the real estate in question or by reason of the above transaction. After the sale these written appeals for assistance continued, still unaccompanied by any suggestion of any claim or right. In May, 1914, over fourteen years after the first request by Benjamin McNeill upon Rivers to assist him to save the property, a demand was made upon Rivers for about $25,000, on the theory that he was obligated to complainants to this amount by virtue of a trust.

The bill filed charges that Rivers McNeill agreed for himself and his sister, Mrs. Crudup, that he would pay for and take over the property involved and hold it until a desirable sale could be made, and then account for the proceeds to the complainants; that he did take the

During this extended period complainants made attempts to procure a purchaser for the property but without success. In January, 1922, there having been no sale and no redemption being made, the defendants advanced to the holders of the certificate the balance due on the certificate and obtained its transfer to themselves, and master's deeds to the property were issued to them, all of which was known to the complainants, who thereupon ceased to attempt to secure a purchaser. From this time on the defendants treated the property in all respects as their own, and complainants ceased entirely to have any connection therewith or to assert any claim of any interest therein. In January, 1923, defendants sold the property for $23,000.

For a number of years before this sale numerous letters passed between the complainants, who then lived in Grand Rapids, Michigan, and Rivers Colbert, which indicated that the complainants were in financial straits, and asking Rivers for assistance. No claims were made at any time based upon any right or interest in the real estate in question or by reason of the above transaction. After the sale there were written appeals for assistance continued, still unaccompanied by any suggestion of any claim in that. In May, 1924, over fourteen years after the first conveyance to Benjamin Mitchell upon trust to assist him to save the property, a demand was made upon Rivers for about $10,000, on the theory that he was obligated to complainants as to the amount by virtue of a trust.

The bill filed charges that Rivers, being engaged for himself and his sister, Ira, claimed, that he would pay for and take over the property involved and hold it until a desirable sale could be made, and then account for the proceeds to the complainants; that he did take the

property and afterwards sold it, but failed to account.

We are of the opinion that this allegation of the bill is not supported by the evidence. After considering the variant testimony as to the transaction, we are of the opinion that the chancellor was fully justified in concluding that the claims of the complainants were not proven but that rather the more convincing evidence showed that the arrangement was as above stated, that is, that the money was advanced simply to secure an extension of time within which the complainants might act with a view to saving the property, but that if they were unable to accomplish this defendants were, by making further advances, to take the property as their own. We think also that even if the promise was as claimed by complainants the Statute of Frauds would prevent its enforcement. Ryder v. Ryder, 244 Ill. 297, is precisely in point, the court saying of facts similar to those before us: "There can be no recovery by the complainants in this case as said agreement would be within the Statute of Frauds, and the Statute of Frauds having been pleaded there could be no recovery, as such an agreement could not be legally established by parol testimony."

The bill also charges that Rivers McNeill, either by fraud or by abuse of a fiduciary relation, obtained the property from complainants which they would not otherwise have parted with, and which he should now in equity be compelled to account for on the theory of a constructive trust. In Alwood v. Mansfield, 59 Ill. 496, 507, the court quotes with approval the definition of a constructive trust given in Hill on Trustees, 144, as follows:

> "Whenever the circumstances of a transaction are such that the person who takes the legal estate in

property and afterwards sold it, but failed to account.

We are of the opinion that this allegation of the bill is not supported by the evidence. After considering the variant testimony as to the transaction, we are of the opinion that the chancellor was fully justified in concluding that the claims of the complainants were not proven but that rather the more convincing evidence showed that the arrangement was as above stated, that is, that the money was advanced simply to secure an extension of time within which the complainants might act with a view to saving the property, but that if they were unable to accomplish this defendants were, by making further advances, to take the property as their own. We think also that even if the promise was as claimed by complainants the statute of frauds would prevent its enforcement. Ryder v. Ryder, 244 Ill. 397, is precisely in point, the court saying of facts similar to those before us: "There can be no recovery by the complainants in this case as said agreement would be within the statute of frauds, and the status of frauds having been pleaded there could be no recovery, as such an agreement could not be legally established by parol testimony."

The bill also charges that Alvera Kornell, either by fraud or by abuse of a fiduciary relation, obtained the property from complainants when they could not otherwise have proved wills, and which he should now in equity be compelled to account for on the theory of a constructive trust. In Alwood v. Mansfield, 30 Ill. 486, 397, the court quotes with approval the definition of a constructive trust given in Hill on Trustees, 144, as follows:

"Whenever the circumstances of a transaction are such that the person who takes the legal estate in

> property, can not also enjoy the beneficial interest, without necessarily violating some established principle of equity, the court will immediately raise a constructive trust and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties, who, in equity, are entitled to the beneficial enjoyment."

In Reed v. Reed, 135 Ill. 482, our court approves the definition given in Perry on Trusts, section 27, as follows:

> "A constructive trust is one that arises when a person clothed with some fiduciary character, by fraud or otherwise, gains some advantage to himself."

There are many decisions in our courts dealing with the subject of constructive trusts. In Miller v. Miller, 266 Ill. 522, after a full discussion of the subject and of decided cases, the court divides constructive trusts generally into (1) those cases in which there is actual fraud giving rise on equitable grounds to a constructive trust, and (2) cases in which there is a confidential relation and a subsequent abuse of this relation.

Applying these definitions to the transaction before us, it cannot be said with any substantial support that any actual fraud has been shown. Neither do we find the existence of either any confidential relation between the parties or any abuse thereof. The only possible basis for the claim of the existence of any confidential relation is found in the fact that Benjamin McNeill is a brother of the defendants. To hold that as a matter of law this relationship alone gave the transaction a fiduciary character, would make it dangerous for persons related by family ties to deal with each other in an ordinary business transaction. That the mere relationship of the parties is not sufficient has been held in Dick v. Albers, 243 Ill. 231, wherein the court said: "The relationship existing between father and son where the son is an adult and doing business for himself

property, can not also enjoy the beneficial interest, without necessarily violating some established principle of equity, the court will immediately raise a constructive trust and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties, who, in equity, are entitled to the beneficial enjoyment."

In Reed v. Reed, 150 Ill. 462, our court approves the definition given in Perry on Trusts, section 27, as follows:

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There are many decisions in our courts dealing with the subject of constructive trusts. In Miller v. Miller, 266 Ill. 332, after a full discussion of the subject and of decided cases, the court divides constructive trusts generally into (1) those cases in which there is actual fraud giving rise to equitable grounds to a constructive trust, and (2) cases in which there is a confidential relation and a consequent abuse of that relation.

Applying these definitions to the transaction before us, it cannot be said that any substantial support that any actual fraud has been shown. Neither do we find the existence of either any confidential relation between the parties or any abuse thereof. The only possible basis for the claim of the existence of any confidential relation is found in the fact that Benjamin Ehrlich is a relative of the defendants. We hold that as a matter of law a mere relationship alone gives the trial court a fiduciary character, would make it dangerous for persons related by family ties to deal with each other in an ordinary business transaction. That the mere relationship of the parties is not sufficient has been held in Mick v. Mihere, 244 Ill. 433, wherein the court said: "The relationship existing between father and son where the son is an adult and doing business for himself

is not necessarily a fiduciary relation to which the equitable doctrine of constructive trusts is applicable." There is no other showing which even remotely tends to support the claim of fiduciary relations. The parties did not live together, and sustained no relations except of ordinary friendliness; they were entirely independent of each other; there were no joint interests in real estate except that they all inherited property from their grandfather, which was divided in the year 1885, the interests thereafter remaining entirely separate and distinct. Complainant himself testifies that he never had any dealings with Rivers McNeill in real estate. There were no mutual business relations of any kind whatever. Neither can it be said that Rivers possessed any superior knowledge or ability in real estate transactions which would give rise to any special confidence or trust in him. Benjamin was equally if not better informed as to real estate in Chicago than was Rivers, and their experience was very much alike. There is no element whatever in the transaction giving rise to any special fiduciary relations between them, except those elements which exist in any business transaction. The whole matter was simply an attempt by the defendants, at the solicitation of the complainants, to obtain for the complainants a further time in which to dispose of the property, and the defendants accomplished all that they undertook to do, not because of any special trust or confidence reposed in them by complainants but simply as a matter of brotherly and sisterly friendliness.

In Biggins v. Biggins, 133 Ill. 211, the court had under consideration a conveyance by a brother to a sister, where it was sought to establish a confidential relation between the parties in which a court of equity ought to interfere and establish a trust. The court declined to in-

is not necessarily a fiduciary relation to which the doctrine of constructive trusts is applicable." There is no other showing which even remotely tends to support the claim of fiduciary relations. The parties did not live together, and sustained no relations except of ordinary friendliness; they were entirely independent of each other; there were no joint interests in real estate except that they all inherited property from their grandfather, which was divided in the year 1885, the interests thereafter remaining entirely separate and distinct. Complainant himself testifies that he never had any dealings with Steven McKeil in real estate. There were no mutual business relations of any kind whatever. Neither can it be said that Steven possessed any superior knowledge or ability in real estate transactions which would give rise to any special confidence or trust in him. Montanin was equally if not better informed as to real estate in Chicago than was Steven, and their experience was very much alike. There is no element whatever in the transaction giving rise to any special fiduciary relations between them, except those elements which exist in any business transaction. The whole matter was simply an attempt by the defendants, at the solicitation of the complainants, to obtain for the complainants a further time in which to dispose of the property, and the defendants accomplished all that they undertook to do, not because of any special trust or confidence reposed in them by complainants but simply as a matter of brotherly and sisterly friendliness.

In Mighton v. Mighton, 1[illegible] Ill. [illegible], the court had under consideration a conveyance by a brother to a sister, where it was sought to establish a confidential relation between the parties in which a court of equity ought to interfere and establish a trust. The court continued to in-

terfere.

In Bullenkamp v. Bullenkamp, 60 N. Y. Supp. 84, the facts were very much like those before us, and the court said:

> "It clearly appeared that, without some such measure as was resorted to, the property would necessarily be lost. This situation was just as well understood by the plaintiff as by her brother; and the conveyance, in this view, was as well understood by the plaintiff to be for the purpose of enabling the brother to obtain the money and preserve the property, as it was by the brother or any other person connected with the transaction. Undoubtedly the plaintiff thought, and perhaps believed, that by reason of taking such steps her brother would be enabled to preserve the property for her by his subsequent handling of the same; and, as this seemed at this time to be the only means by which anything could be saved to any of the parties, the plaintiff consented to such arrangement. Both of these persons were of mature age, and dealt, as the evidence conclusively establishes, upon terms of equality."

Counsel for the complainants devote the larger part of their brief and argument to the contention that the quit claim deed given in December, 1900, by complainants to defendants, though absolute in form was in fact a mortgage. No reasonable consideration is advanced to support this theory. The evidence of the transaction entirely negatives the conclusion that there was any loan made to any one; the testimony is all in harmony on this point. It has been held many times that before a conveyance absolute on its face can be transformed into a mortgage a clear and satisfactory intent to this effect must be shown. May v. May, 158 Ill. 209; Williams v. Williams, 180 Ill. 361, and cases cited. There being no loan between the parties, there was therefore nothing in the nature of a subsisting debt to be secured by mortgage. Burgett v. Osborne, 172 Ill. 227; Batcheller v. Batcheller, 144 Ill. 471; and in Heaton v. Gaines, 198 Ill. 479, the court states the rule to be that in order to establish the fact that a deed absolute upon its face is a mortgage "it must appear that a debt exists,

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In Wallenkamp v. Wallenkamp, 60 N. E. Rep. 94, the facts were very much like those before us, and the court said:

> "It clearly appeared that, without such money as was received to, the property would necessarily be lost. This situation was just as well understood by the plaintiff as by her brother; and the conveyance, in this view, was as well understood by the plaintiff to be for the purpose of enabling the brother to obtain the money and procure the property, as it was by the brother or any other person connected with the transaction. Undoubtedly the plaintiff thought, and perhaps believed, that by reason of taking such steps her brother would be enabled to preserve the property for her by his subsequent handling of the money; and, as this seemed at this time to be the only means by which the property could be saved to any of the parties, the plaintiff consented to such arrangement. Both of these persons were of mature age, and dealt, as the evidence certainly establishes, upon terms of equality."

Counsel for the complainants devote the larger part of their brief and argument to the contention that the quit claim deed given in December, 1901, by complainants to defendants, though absolute in form was in fact a mortgage. No reasonable consideration is advanced in support this theory. The evidence of the transaction certainly negatives the conclusion that there was any loan [illegible] the transaction is all in memory on this point. [illegible] said many times that [illegible] a loan a [illegible] face can be transformed into a [illegible] and [illegible] factory intent to [illegible] effect [illegible] Ill. 1. Ill. 1[illegible] Ill. 4[illegible]; Wallenkamp v. Wallenkamp, [illegible] cited. [illegible] to loan [illegible] mortgage [illegible] secured by mortgage. [illegible] v. [illegible] Ill. [illegible]; Patterson v. Patterson, 142 Ill. [illegible] v. Gaines, 152 Ill. 472, the court stated [illegible] to be in order to establish the fact that a deed absolute upon its face is a mortgage "it must appear that a loan existed.

due from the person claimed to be mortgager to the person claimed to be mortgagee." In the absence of any debt there can be no mortgage. A large number of decided cases support this. It might also be said that there was nothing substantial which complainants had at the date of the conveyance by quit claim which could be the subject of a mortgage; all right or interest of complainants in the premises was on the verge of expiring, which negatives completely the suggestion that any one would accept their interest as security for a loan. Carpenter v. Plagge, 192 Ill. 82, is in point, where the court said:

> "When the instrument of October 8, 1878, was executed, the twelve months, allowed by law to the appellants and to the other heirs of Daniel F. Carpenter, deceased, to redeem the forty acres from the foreclosure sale, had expired, or were about to expire. Upon the expiration of the statutory period of twelve months appellants had no interest in the property. During the three months after the expiration of the twelve months only judgment creditors could redeem. Inasmuch, therefore, as appellants had no interest in the property by reason of the expiration of the twelve months, there was no title in them which they could mortgage."

See, also, Burgett v. Osborne, supra, and Conkey v. Rex, 212 Ill. 444.

A further consideration is that the conduct of the parties after the period of redemption had expired in January, 1902, cannot be reconciled with the theory that complainants retained any equitable interest in the property. Defendants went immediately into possession of the land, paid all the taxes, and held themselves out to be the owners, and nine years thereafter made a sale, all of which was fully known to the complainants, who never questioned the acts of defendants until three years after the sale had been made. No claim was made during all of this time as to the existence of a mortgage or that the quit claim deed was anything else h than an absolute conveyance.

due from the person claimed to be mortgagor to the person claimed to be mortgagee." In the absence of any fact there can be no mortgage. A large number of recited cases support this. It might also be said that there was nothing substantial which complainants had at the date of the conveyance by quit claim which could be the subject of a mortgage; all rights or interest of complainants in the premises was on the verge of expiring, which negatives completely the suggestion that any one would accept their interest as security for a loan.

Carpenter v. Pierce, 104 Ill. 8, is in point, there the court said:

> "When the instrument of October 8, 1874, was executed, the twelve months, allowed by law to the appellants and to the other heirs of Daniel C. Carpenter, deceased, to redeem the forty acres from the foreclosure sale, had expired, or were about to expire. Upon the expiration of the statutory period of twelve months appellants had no interest in the property. During the three months after the expiration of the twelve months only judgment creditors could redeem. Thereafter, therefore, as appellants had no interest in the property by reason of the expiration of the twelve months, there was no title in them which they could convey."

See, also, Burnett v. Osborne, supra, and Parker v. Lee, 111 Ill. 444.

A further consideration is that the amount of the parties after the period of redemption had expired in January, 1904, cannot be reconciled with the theory that complainants retained any equitable interest in the property. Defendants went immediately into actual possession of the land, paid all the taxes, and held undisputed possession for more than nine years thereafter when a sale, of which they had full known to the complainants, the owner accepted it as a means of defendants until three years after the sale had been made. No claim was made during all of this time to the existence of a mortgage or that the quit claim deed was anything else than an absolute conveyance.

In 27 Cyc. 971, it is said that "after the expiration of the time during which the grantor had a right to repurchase, he allows the grantee to sell the property to a stranger, and sees the latter enter and improve, without any claim of a right to redeem on his part, this will be evidence that he considered the original transaction as a sale and not a mortgage." Supporting this is Hart v. Randolph, 142 Ill. 521.

Finally, it may be said that complainants have been guilty of laches so as to bar the relief they seek. As noted above, the character of the transaction between the parties was not questioned until over fourteen years thereafter. What is said in McDearmon v. Burnham, 158 Ill. 55, is peculiarly applicable to the present case:

> "When a court of equity is asked to lend its aid in the enforcement of a demand that has become stale, there must be some cogent and weighty reasons presented why it has been permitted to become so. Good faith, conscience and reasonable diligence of the party seeking its relief are the elements which call a court of equity into activity. In the absence of these elements the court remains passive, and declines to extend its relief or aid. It has always been the policy to discountenance laches and neglect."

This is quoted with approval in Fitch v. Miller, 200 Ill. 170, and in Moore v. Taylor, 251 Ill. 468, the court said: "Equity does not encourage stale claims, since by lapse of time there must, of necessity, be great difficulty in ascertaining the exact facts as to the matter in controversy. Unreasonable delay has been held to be a bar to equitable relief, even against a trustee."

We have not noted in this opinion many of the items of testimony, nor attempted to state what took place at all of the interviews between the parties, consideration of which has not altered our conclusion that upon the whole record there is no equity with the complainants and that the chancellor

In 27 Dyc. 271, it is said that "after the expiration of the time during which the grantor had a right to repurchase, he allows the grantee to sell the property to a stranger, and does the latter enter and improve, without any claim of a right to redeem on his part, this will be evidence that he considered the original transaction as a sale and not a mortgage." Supporting this is Hunt v. Lundquist, 142 Ill. 321.

Finally, it may be said that complainants have been guilty of laches so as to bar the relief they seek. As noted above, the character of the transaction between the parties was not questioned until over fourteen years thereafter. What is said in Robertson v. Burnham, 158 Ill. 65, is peculiarly applicable to the present case:

> "When a court of equity is asked to lend its aid in the enforcement of a demand that has been neglected, there must be some cogent and weighty reasons presented why it has been permitted to remain so. Good faith, confidence and reasonable diligence of the party seeking its relief are the elements which call a court of equity into activity. In the absence of these elements the court remains passive, and declines to extend its relief or aid. It has always been the policy to discountenance laches and neglect."

This is quoted with approval in Ziegler v. Miller, [illegible] Ill. 170, and in Moore v. Taylor, 251 Ill. 466, the court said: "Equity does not encourage stale claims, since by lapse of time evidence must, of necessity, be great difficulty in ascertaining the exact facts as to the matter in controversy. Unreasonable delay has been held to be a bar to equitable relief, even against a trustee."

We have not noted in this opinion much of the issue of testimony, nor attempted to state what took place at all of the interviews between the parties, some portion of which has not altered our conclusion that upon the whole record there is no equity with the complainants and that the chancellor

was right in ordering that the bill be dismissed.

For the reasons above indicated the decree dismissing the bill for want of equity is affirmed.

AFFIRMED.

was right in ordering that the bill be dismissed.

For the reasons above indicated the decree dismissing the bill for want of equity is affirmed.

AFFIRMED.

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MAX ZAMIAR,
Appellee,

vs.

THE PEOPLES GAS LIGHT AND COKE COMPANY, a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

204 I.A. 290

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, while on North avenue, in Chicago, was struck and injured by an automobile truck. He brought suit for damages, and upon trial by a jury had judgment for $5,000 from which defendant has appealed.

By appropriate pleas the ownership of the automobile truck was put in issue, and most of the testimony in the case touches this question. The testimony of plaintiff tending to show that the defendant owned the truck was, to say the least, rather frail, depending almost exclusively upon the story of two witnesses. Defendant placed upon the stand a considerable number of witnesses, many of them its employees, who gave evidence which if true tended strongly to prove defendant's claim of non-ownership. It was an exceedingly close case, so that the necessity of accurate instructions was imperative. At the request of plaintiff the court gave the following instruction:

> "The court instructs the jury that in considering the credibility of the witnesses and in determining the weight of their testimony, that they may take into consideration the fact that the witness is either in the employ of the defendant or of the plaintiff, and also his connection, if any, with the act causing the injury complained of and take such testimony in connection with all the other evidence in this case, the same as they receive the testimony of any other witness, and determine the credibility of such employee by the same principles and tests by which they determine the credibility of any other witness."

MAX KAMIAN,
Appellee,

vs.

THE FEDERAL GAS LIGHT AND COKE COMPANY, a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

204 I.A. 290

MR. PRESIDING JUSTICE MCGURIN

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By appropriate plea the ownership of the automobile truck was put in issue, and most of the testimony in the case touches this question. The testimony of plaintiff tending to show that the defendant owned the truck was, to say the least, rather frail, depending almost exclusively upon the story of two witnesses. Defendant placed upon the stand a considerable number of witnesses, many of them its employees, who gave evidence which it tried tended strongly to prove defendant's claim of non-ownership. It was an exceedingly close case, so that the necessity of accurate instructions was imperative. At the request of plaintiff the court gave the following instruction:

"The court instructs the jury that in considering the credibility of the witnesses and in determining the weight of their testimony, you may take into consideration the fact that the witness is either in the employ of the defendant or of the plaintiff, and also his connection, if any, with the not owning the injury complained of and take such testimony in connection with all the other evidence in this case, the same as they receive the testimony of any other witness, and determine the credibility of such employes by the same principles and tests by which they determine the credi-

Under the circumstances of this case this instruction should not have been given for the reason that it divides the witnesses into two classes, those who were employees and those who were not. As the Supreme Court stated in Cicero Street Ry. Co. v. Rollins, 195 Ill. 219, this classification was uncalled for and in view of the facts should not have been made. "No employee of an individual litigant testified in the case, and it was improper for the court to put those of the defendant on the same footing with that class of employees." Among other decided cases in which such an instruction has been condemned are Bennett v. Chicago City Ry. Co., 243 Ill. 420; Roberts v. Chicago City Ry. Co., 262 Ill. 228; Dowd v. Chicago City Ry. Co., 153 Ill. App. 85, and Owens v. Chicago City Ry. Co., 171 Ill. App. 647.

In view of the absence of any evidence that any of the witnesses, save plaintiff, had any personal connection with the accident itself, it was improper to suggest that there was such connection by using in the instruction the words, "and also his connection, if any, with the act causing the injury complained of."

At the request of plaintiff the court also gave that familiar instruction with which attorneys so frequently risk a reversal, which is as follows:

> "The court instructs the jury that the fact, if it is a fact, that the number of witnesses testifying in this case on one side is larger than the number who testified on the other side, does not necessarily alone determine that the preponderance of evidence is on the side on which the larger number testified. In order to determine that question, the conduct of the witnesses while testifying, their apparent intelligence or the lack of it, their opportunity for knowing or seeing the facts or circumstances concerning which they have testified, or the absence of such opportunity, as shown by the evidence, their interest or the absence of interest in the result of the case, as shown by the evidence, and from all these facts, and from all the other facts and circumstances shown by the evidence, the jury must determine on which side is the preponderance."

Under the circumstances of this case this instruction should not have been given for the reason that it divides the witnesses into two classes, those who were employees and those who were not. As the Supreme Court stated in Chicago Street Ry. Co. v. Hollins, 195 Ill. 228, this classification was uncalled for and in view of the facts should not have been made. "No employee of an individual litigant testified in the case, and it was improper for the court to put those of the defendant on the same footing with that class of employees." Among other decided cases in which such an instruction has been condemned are Bennett v. Chicago City Ry. Co., 246 Ill. 420; Roberts v. Chicago City Ry. Co., 262 Ill. 228; Dowd v. Chicago City Ry. Co., 152 Ill. App. 85, and Owens v. Chicago City Ry. Co., 171 Ill. App. 647.

In view of the absence of any evidence that any of the witnesses, save plaintiff, had any personal connection with the accident itself, it was improper to suggest that there was such connection by using in the instruction the words, "and also his connection, if any, with the act causing the injury complained of."

At the request of plaintiff the court also gave that familiar instruction with which attorneys so frequently wish a reversal, which is as follows:

"The court instructs the jury that the fact, if it is a fact, that the number of witnesses testifying in this case on one side is larger than the number who testified on the other side, is not conclusive alone determine that the preponderance of evidence is on the side on which the larger number testified. It does not determine that question, the comparison of the witnesses while testifying, their apparent intelligence, their manner, their opportunity for knowing the facts or circumstances concerning which they have testified, or the absence of such opportunity, as shown by the evidence, their interest or the absence of interest in the result of the suit, as shown by the evidence, and from all those facts, and from all the other facts and circumstances shown by the evidence, the jury must determine on which side is the preponderance."

In this case the number of witnesses testifying on one side was an important matter to be considered by the jury in determining where was the preponderance of evidence. It was reversible error to smother this important factor by the negative words used in the first part of the instruction and by omitting it entirely from the affirmative statement of the elements necessary to be considered. See Elgin, J. & E. Ry. Co. v. Lawler, 229 Ill. 621; Lyons v. Ryerson & Son, 242 Ill. 409; Lyons v. Chicago City Ry. Co., 258 Ill. 75.

Complaint is made by the defendant of the refusal of the court to give the instruction tendered by it to the effect that it must be shown that the car was operated by defendant's servants acting within the scope of their authority. In view of the theory of the defendant that it did not own the car causing the accident it was not reversible error to refuse this.

The two medical witnesses, Doctors Wolf and Handmacher, testified that they had examined the plaintiff, not for the purpose of treatment but for the purpose of qualifying for giving testimony. They were permitted to give an opinion based upon information given to them concerning the history of the case, and partly upon subjective symptoms in addition to objective symptoms. The admission of such testimony constituted prejudicial error, as has been held repeatedly. Among many cases so holding are Grienke v. Chicago City Ry. Co., 234 Ill. 564; Fuhry v. Chicago City Ry. Co., 239 Ill. 548; Shaughnessy v. Holt, 236 Ill. 485; Chicago Union Traction Co. v. Giese, 229 Ill. 260.

For the errors above indicated the judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

In this case the number of witnesses testifying on one side was an important matter to be considered by the jury in determining where was the preponderance of evidence. It was reversible error to another this important factor by the negative words used in the first part of the instruction and by omitting it entirely from the affirmative statement of the elements necessary to be considered. See Ellis, 4. & M. Ry. Co. v. Lawler, 109 Ill. 621; Lyons v. Lyons & Son, 242 Ill. 408; Lyons v. Chicago City Ry. Co., 258 Ill. 75.

Complaint is made by the defendant of the refusal of the court to give the instruction tendered by it to the effect that it must be shown that the car was operated by defendant's servants acting within the scope of their authority. In view of the theory of the defendant that it did not own the car causing the accident it was not reversible error to refuse this.

The two medical witnesses, Doctors Wolf and Handsacker, testified that they had examined the plaintiff, not for the purpose of treatment but for the purpose of qualifying for giving testimony. They were permitted to give an opinion based upon information given to them concerning the history of the case, and practically on subjective symptoms in addition to objective symptoms. The admission of such testimony constituted prejudicial error, as has been held repeatedly. Among many cases see Illinois Steel v. Chicago City Ry. Co., 234 Ill. 234; Ryan v. Chicago City Ry. Co., 250 Ill. 318; Chicago v. [illegible], 254 Ill. [illegible]; Chicago Union Traction Co. v. Hart, [illegible] Ill. 200.

For the errors above indicated the judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

275 - 22709

THE SHERARDIZING COMPANY OF ILLINOIS, a corporation,
Appellant,

vs.

THE FEDERAL SIGN SYSTEM,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

204 I.A. 297

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks to have reversed a judgment entered against it on the defendant's claim of set-off.

Plaintiff performed for defendant the process of "sherardizing" certain metal rings, delivered by defendant to plaintiff for that purpose. "Sherardizing" seems to be a process for covering metal with a zinc powder by the aid of heat. It brought suit to recover for these services, and it its statement of claim set forth an item under date of November 6, 1915, of $35.22, and another under date of November 10, 1915, of $7.26. By its affidavit of defense defendant admitted the correctness of the item of November 6th, but claims that the rings delivered for sherardizing on November 10th were completely spoiled and made useless, to the loss of defendant of $92.80. On trial by the court there was a finding favorable to defendant's claim of set-off, and damages were assessed at $57.68 against the plaintiff and judgment entered thereon.

From the evidence the court could properly find that 20,000 rings were sent by the defendant to the plaintiff to be sherardized, but that through improper work the rings were spoiled so as to be rendered uselsss. The

275 - 25709

THE SHERARDIZING COMPANY OF ILLINOIS, a corporation, Appellant,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
THE THERMAL SIGN SYSTEM, Appellee.	

MR. PRESIDING JUSTICE MCGURREN

DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks to have reversed a judgment entered against it on the defendant's claim of set-off.

Plaintiff performed for defendant the process of "sherardizing" certain metal rings, delivered by defendant to plaintiff for that purpose. "Sherardizing" seems to be a process for covering metal with a zinc powder by the aid of heat. It brought suit to recover for these services, and it its statement of claim set forth an item under date of November 6, 1919, of $35.75, and another under date of November 10, 1919, of $7.25. By its affidavit of defense defendant admitted the correctness of the item of November 6th, but claims that the rings delivered for sherardizing on November 10th were completely spoiled and made useless, to the loss of defendant of $92.50. On trial by the court there was a finding favorable to defendant's claim of set-off, and damages were assessed at $97.00 against the plaintiff and judgment entered thereon.

From the evidence the court could properly find that 20,000 rings were sent by the defendant to the plaintiff to be sherardized, but that through improper work the rings were spoiled so as to be rendered useless. The

court could also properly find that the value of these rings was $4.64 per thousand. It would follow from these facts that plaintiff was liable for the loss of these rings and defendant was properly entitled to damages. We think there is sufficient proof in the record of the amount of damages; the evidence is undisputed as to their value before they were sent to the plaintiff, and that when returned they were wholly useless.

The judgment is right and is affirmed.

AFFIRMED.

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The judgment is right and is affirmed.

AFFIRMED.

279 - 22713

THE J. W. HOODWIN COMPANY,
a corporation,
Appellee,

vs.

A. E. PINKERTON, R. R. PINKERTON and J. W. RANKIN

On appeal of A. E. PINKERTON and R. R. PINKERTON,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

204 I.A. 298

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $50 against the defendants, upon trial by the court in an action of tort. Suit was originally brought against Matt W. Pinkerton and the other defendants, but Matt W. Pinkerton having died pendente lite the suit was discontinued as to him.

Plaintiff claims that in February, 1914, it was induced to pay the sum of $50 to Henry E. Failer, an agent of the defendants, who were doing business under the name of Pinkerton & Co., U. S. Detective Agency, upon a representation by Failer that this was the same company as the Pinkerton National Detective Agency, with its office on 5th avenue, Chicago. The defense presented by the defendants A.E. Pinkerton and R. R. Pinkerton, who are appealing here, is that they were not connected in any manner with the Pinkerton & Co., U. S. Detective Agency which received plaintiff's money.

While the evidence tends to show that plaintiff was induced to pay the money involved upon the representation that he was dealing with the older company, called the Pinkerton National Detective Agency, yet we cannot say that the evidence

THE J. W. HOODWIN COMPANY,
a corporation,
Appellee,

vs.

A. M. PINKERTON, R. H. PINKER-
TON and J. W. RANKIN

On appeal of A. M. PINKERTON
and R. H. PINKERTON,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $50 against the defendants, upon trial by the court in an action of tort. Suit was originally brought against Matt J. Pinkerton and the other defendants, but just R. Pinkerton having died pendente lite the suit was discontinued as to him.

Plaintiff claims that in February, 1914, it was induced to pay the sum of $50 to Henry K. Rafter, an agent of the defendants, who were doing business under the name of Pinkerton & Co., U. S. Detective Agency, upon a representation by Rafter that this was the same company as the Pinkerton National Detective Agency, with its office on Dearborn avenue, Chicago. The defense presented by the defendants A.M. Pinkerton and R. H. Pinkerton, who are appealing here, is that they were not connected in any manner with the Pinkerton & Co., U. S. Detective Agency which received plaintiff's money.

While the evidence tends to show that plaintiff was induced to pay the money involved upon the representation that he was dealing with the Rafter company, called the Pinkerton National Detective Agency, yet we cannot say that the evidence

shows that the defendant A. E. Pinkerton, whose full name is Anna E. Pinkerton and who is the widow of Matt W. Pinkerton, or the defendant R. R. Pinkerton, whose full name is Ralph R. Pinkerton, had any interest whatever, either as partners or otherwise, in the Pinkerton & Co., U. S. Detective Agency. There was introduced a letter from this latter company, and on the letterhead appeared - "A. E. Pinkerton, Assistant General Manager" and "R. R. Pinkerton, Assistant General Manager"; but Mrs. Pinkerton is positive in her denial that her name appeared there with her consent. There was also introduced a bill which was in the custody of the clerk of the United States District Court as part of the files in a suit, in which bill it was stated that A. E. Pinkerton and R. R. Pinkerton are part owners of an interest in the business of this agency, but the bill was not signed by either A. E. Pinkerton or R. R. Pinkerton, and the evidence shows that they had no knowledge whatever of such a proceeding.

It is a fair inference from the record that Matt W. Pinkerton in his lifetime, for purposes he thought advantageous to him, used on his letterheads and advertisements the names of his wife and minor son without their knowledge or consent.

We hold that plaintiff has failed to prove any connection of these defendants who appeal with the detective agency in question, and that rather the greater weight of the evidence tends to prove that there was no connection.

The appellee has not appeared in this court.

At the conclusion of the case counsel for defendants A. E. Pinkerton and R. R. Pinkerton moved the court to find them not guilty, which motion was denied. In so

shows that the defendant A. R. Pinkerton, whose full name is Anna E. Pinkerton and who is the widow of Matt W. Pinkerton, or the defendant R. H. Pinkerton, whose full name is Ralph H. Pinkerton, had any interest whatever, either as partners or otherwise, in the Pinkerton & Co., U. S. Detective Agency. There was introduced a letter from this latter company, and on the letterhead appeared - "A. E. Pinkerton, Assistant General Manager" and "R. H. Pinkerton, Assistant General Manager"; but Mrs. Pinkerton is positive in her denial that her name appeared there with her consent. There was also introduced a bill which was in the custody of the clerk of the United States District Court as part of the files in a suit, in which bill it was stated that A. E. Pinkerton and R. H. Pinkerton are part owners of an interest in the business of this agency, but the bill was not signed by either A. E. Pinkerton or R. H. Pinkerton, and the evidence shows that they had no knowledge whatever of such a proceeding.

It is a fair inference from the record that Matt W. Pinkerton in his lifetime, for purposes he thought advantageous to him, used on his letterheads and advertisements the names of his wife and minor son without their knowledge or consent.

We hold that plaintiff has failed to prove any connection of these defendants who appear with the detective agency in question, and that rather the greater weight of the evidence tends to prove that there was no connection.

The appellee has not appeared in this court.

At the conclusion of the case counsel for defendants A. E. Pinkerton and R. H. Pinkerton moved the court to find them not guilty, which motion was denied. In so

ruling the trial court was in error; the motion should have been allowed.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

ruling the trial court was in error; the motion should have been allowed.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

284 — 22718

JOHN F. CAMPBELL COMPANY,
a corporation,
Appellee,

vs.

LAWRENCE ICE CREAM COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

204 I.A. 299

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover from the defendant the agreed price of 200 barrels of sugar which had been sold and delivered to the defendant. Upon trial by the court judgment was had by the plaintiff for $1,502.77.

From the evidence the court could properly find that the plaintiff is a dealer and broker in sugars, in Chicago, and that the defendant is engaged in the manufacture of ice cream in the same city, that about a year before the time of the transaction in question plaintiff had made a sale to the defendant, and other sales at earlier dates. John E. Bunker was vice-president of the plaintiff company, devoting himself principally to the sales department. He had called at the place of business of the defendant many times with a view to procuring orders for sugar, at which times he had had conversations with Joseph A. Rosenberg, who was the buyer for defendant and also president of the defendant company. On August 18, 1914, someone from the defendant gave an order over the phone to the president of the plaintiff for 200 barrels of sugar at a specified price.

The whole controversy centers around this telephone

284 - 22318

JOHN R. CARPENTER COMPANY, a corporation, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
LAWRENCE ICE CREAM COMPANY, a corporation, Appellant.	

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover from the defendant the agreed price of 200 barrels of sugar which had been sold and delivered to the defendant. Upon trial by the court judgment was had by the plaintiff for $1,202.77.

From the evidence the court could properly find that the plaintiff is a dealer and broker in sugars, in Chicago, and that the defendant is engaged in the manufacture of ice cream in the same city, that about a year before the time of the transaction in question plaintiff had made a sale to the defendant, and other sales at earlier dates. John R. Hunter was vice-president of the plaintiff company, devoting himself principally to the sales department. He had called at the place of business of the defendant many times with a view to procuring orders for sugar, at which times he had conversations with Joseph . Rosenberg, who was the buyer for defendant and also president of the defendant company. On August 18, 1921, sometime from the defendant gave an order over the phone to the president of the plaintiff for 200 barrels of sugar at a specified price.

The whole controversy centers around this telephone

conversation. Mr. Rosenberg, the defendant's president, testified that he gave the order, but that it was an order for himself and not for the defendant, the Lawrence Ice Cream Company. It is not necessary to note the details. The court was abundantly justified in finding that the order was not for Mr. Rosenberg personally but was for the defendant company, for which he was the buyer and of which he was also president. There was no doubt or uncertainty in the contract, and defendant was clearly liable for its failure to perform its conditions of payment at the price agreed upon.

There is no reason to reverse, and the judgment is affirmed.

AFFIRMED.

conversation. Mr. Rosenberg, the defendant's president, testified that he gave the order, but that it was an order for himself and not for the defendant, the Lawrence Ice Cream Company. It is not necessary to note the details. The court was abundantly justified in finding that the order was not for Mr. Rosenberg personally but was for the defendant company, for which he was the buyer and of which he was also president. There was no doubt or uncertainty in the contract, and defendant was clearly liable for its failure to perform its conditions of payment at the price agreed upon.

There is no reason to reverse, and the judgment is affirmed.

AFFIRMED.

287 - 22721

E. F. HEYWOOD, Jr., for use of GREENVILLE STONE & GRAVEL COMPANY, a corporation,
Appellee,

vs.

OLD COLONY TRUST & SAVINGS BANK, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

204 I.A. 300

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to have reversed a judgment against it of $1,632.53.

By plaintiff's statement of claim it is averred that on June 11, 1914, E. F. Heywood, Jr., deposited to his own credit with the defendant by check the sum of $1,500; that on June 17th he drew his check on the defendant for $1,498.50 to the order of F. W. Katterjohn, president of the Greenville Stone & Gravel Company, for whose use this suit is brought; that on the same day Katterjohn presented this check to the defendant, but payment was refused; that prior to drawing said check Heywood had not withdrawn or assigned said amount or any portion thereof.

The defense asserted is that the money deposited by Heywood in fact belonged to a company of which he was secretary, called the Marsh Company; that this company, on the date of the deposit by Heywood, owed defendant $3,667.60 as a balance due for money loaned it by defendant; that after receiving the deposit from Heywood for his account the defendant credited the amount of this check upon the indebtedness of the Marsh Company and charged the same against the deposit account of Heywood, thus extinguishing his deposit

E. F. HEYWOOD, Jr., for use of
GREENVILLE STONE & GRAVEL COMPANY, a corporation,
Appellee,

vs.

OLD COLONY TRUST & SAVINGS BANK,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MORMONEY
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to have reversed a judgment against it of $1,652.52.

By plaintiff's statement of claim it is averred that on June 11, 1914, E. F. Heywood, Jr., deposited to his own credit with the defendant by check the sum of $1,500; that on June 17th he drew his check on the defendant for $1,498.50 to the order of F. W. Rutterjohn, president of the Greenville Stone & Gravel Company, for whose use this suit is brought; that on the same day Rutterjohn presented this check to the defendant, but payment was refused; that prior to drawing said check Heywood had not withdrawn or assigned said amount or any portion thereof.

The defense asserted is that the money deposited by Heywood in fact belonged to a company of which he was secretary, called the Marsh Company; that this company, on the date of the deposit by Heywood, owed defendant $3,657.0[illegible] as a balance due for money loaned it by defendant; that after receiving the deposit from Heywood for his account the defendant credited the amount of this check upon the indebtedness of the Marsh Company and charged the same against the deposit account of Heywood, thus extinguishing his deposit

account, so that when six days later Katterjohn presented the check drawn by Heywood there were no funds in this account with which to pay the check. Defendant claimed a right of set-off for the full amount of plaintiff's claim.

To this plaintiff asserted by affidavit that the Marsh Company had no ownership or interest in the Heywood check or the funds represented thereby; that the equitable interest therein was in the Greenville Stone & Gravel Company, and that Heywood held the same in trust for it; that Heywood at no time acted as agent for the Marsh Company in making deposits of the Marsh Company to the credit of Heywood in the defendant's bank. It is admitted that the defendant applied the proceeds of the check in extinguishment of the debt of the Marsh Company, but it is averred that said application was wrongful and without authority.

The case was tried by the court without a jury, and upon its conclusion the court found the issues for the plaintiff and entered judgment for the original sum of $1,498.50, the amount of the check, with interest thereon at 5% from June 17, 1914, to the date of the entry of judgment.

We are of the opinion that the court properly could find from the evidence that on or about June 9, 1914, the beneficial plaintiff, Greenville Stone & Gravel Company, through its president, F. W. Katterjohn, was negotiating for the purchase of two boilers from the Village of Forest Park with the Marsh Company, who were commission brokers in the purchase and sale of contractors' machinery and equipment. Heywood was secretary of the Marsh Company, with whom Mr. Katterjohn was conducting the deal. They went to Forest Park and had the boilers inspected, and closed arrangements

account, so that when six days later Ketterjohn presented the check drawn by Heywood there were no funds in this account with which to pay the check. Defendant claimed a right of set-off for the full amount of plaintiff's claim.

To this plaintiff asserted by affidavit that the Marsh Company had no ownership or interest in the Heywood check or the funds represented thereby; that the equitable interest therein was in the Greenville Stone & Gravel Company, and that Heywood held the same in trust for it; that Heywood at no time acted as agent for the Marsh Company in making deposits of the Marsh Company to the credit of Heywood in the defendant's bank. It is admitted that the defendant applied the proceeds of the check in extinguishment of the debt of the Marsh Company, but it is averred that said application was wrongful and without authority.

The case was tried by the court without a jury, and upon its conclusion the court found the issues for the plaintiff and entered judgment for the original sum of $1,498.50, the amount of the check, with interest thereon at 5% from June 17, 1914, to the date of the entry of judgment.

We are of the opinion that the court properly could find from the evidence that on or about June 9, 1914, the beneficial plaintiff, Greenville Stone & Gravel Company, through its president, J. W. Ketterjohn, was negotiating for the purchase of two boilers from the Village of Forest Park with the Marsh Company, who were commission brokers in the purchase and sale of contractors' machinery and equipment. Heywood was secretary of the Marsh Company, with whom Mr. Ketterjohn was conducting the deal. They went to Forest Park and had the boilers inspected, and closed arrangements

for the purchase with a representative of the village. For its commission for negotiating this deal the Marsh Company was to receive $500, and $1500 less the cost of dismantling and loading the boilers was to be paid to the Village of Forest Park. Mr. Katterjohn proposed to pay the representative of the village by a check, but was informed by the representative that the payment to the village must be in cash. Mr. Katterjohn did not have the currency with him, and was leaving Chicago that evening to return to his home in Kentucky. It was suggested, and followed, that Katterjohn should draw two checks, one for $500 and the other for $1500, the former being for Marsh Company's commission, and the $1500 was to be used by Mr. Heywood for the purpose of paying the village for the boilers and loading them on the cars. Both checks were made payable to the Marsh Company, but it was agreed with reference to the $1500 check that it should be cashed by Heywood and used by him in consummating the deal with the village. After endorsement by the Marsh Company, the $1500 check was deposited in the defendant bank to the personal account of Heywood. Mr. Katterjohn had left for Kentucky, leaving the matter in Heywood's hands. The proceeds of the check were received by the bank, and it then notified both Heywood and the Marsh Company that it had used the credit and applied the same on the Marsh Company's account, the cashier informing Mr. Marsh of the Marsh Company that "we found the money in here and we decided we would grab it." Heywood thereupon notified Mr. Katterjohn and drew a check to his order for the sum of $1,498.50, which on June 17, 1914, was presented by Katterjohn to the bank and payment refused.

From these facts the conclusion is inevitable that the Marsh Company at no time had any interest, equitable

for the purchase with a representative of the village. For its commission for negotiating this deal the Marsh Company was to receive $500, and $1500 less the cost of dismantling and loading the boilers was to be paid to the Village of Forest Park. Mr. Ketterjohn proposed to pay the representative of the village by a check, but was informed by the representative that the payment to the village must be in cash. Mr. Ketterjohn did not have the currency with him, and was leaving Chicago that evening to return to his home in Kentucky. It was suggested, and followed, that Ketterjohn should draw two checks, one for $500 and the other for $1500, the former being for Marsh Company's commission, and the $1500 was to be used by Mr. Heywood for the purpose of paying the village for the boilers and loading them on the cars. Both checks were made payable to the Marsh Company, but it was agreed with reference to the $1500 check that it should be cashed by Heywood and used by him in consummating the deal with the village. After endorsement by the Marsh Company, the $1500 check was deposited in the defendant bank to the personal account of Heywood. Mr. Ketterjohn had left for Kentucky, leaving the matter in Heywood's hands. The proceeds of the check were received by the bank, and it then notified both Heywood and the Marsh Company that it had used the credit and applied the same on the Marsh Company's account, the cashier informing Mr. Marsh of the Marsh Company that "we found the money in here and we decided we would grab it." Heywood thereupon notified Mr. Ketterjohn and drew a check to his order for the sum of $1,428.50, which on June 17, 1913, was presented by Ketterjohn to the bank and payment refused.

From these facts the conclusion is inevitable that the Marsh Company at no time had any interest, equitable

or otherwise, in the fund received from Katterjohn and deposited in Heywood's account. This money equitably belonged to the Greenville Stone & Gravel Company, and was held by Heywood in trust to be used for the specific purpose of making the necessary cash payment to the Village of Forest Park for the boilers. There was an offer to show that Mr. Katterjohn afterwards went to the village and purchased the boilers directly from it, paying for them in cash. We think the trial court should have admitted this testimony, as it tends to show that the title to the boilers never left the Village of Forest Park. However, we think the evidence which was admitted ample to show that the title to the boilers continued in the village and that Marsh Company never had any interest in them.

The legal title to the deposit was in E. F. Heywood, Jr.; the equitable title being in the Greenville Stone & Gravel Company, the bank was wholly wrong in attempting to apply the fund upon the account of a third party. See Zane on Banks & Banking, Sec. 140; Falkland v. St. Nicholas Nat'l Bank, 84 N. Y. 145.

Our conclusion on the facts and as to the relations of the parties disposes of all points made by counsel for the defendant.

We hold that plaintiff was properly entitled to interest, either upon the theory that there was an unreasonable and vexatious delay in withholding payment, or on the theory that interest will be allowed on money received to the use of another. See Marsh v. First State Bank & Trust Co., 185 Ill. App. 29; Rosenbaum Bros. & Co. v. Drumm Com. Co., 176 Ill. App. 205; Brennan v. Gallagher, 199 Ill. 207.

We are of the opinion that the judgment is right, and it is affirmed.

AFFIRMED.

or otherwise, in the fund received from Ketterjohn and deposited in Heywood's account. This money equitably belonged to the Greenville Stone & Gravel Company, and was held by Heywood in trust to be used for the specific purpose of making the necessary cash payment to the village of Forest Park for the boilers. There was an offer to show that Mr. Ketterjohn afterwards went to the village and purchased the boilers directly from it, paying for them in cash. We think the trial court should have admitted this testimony, as it tends to show that the title to the boilers never left the village of Forest Park. However, we think the evidence which was admitted sufficed to show that the title to the boilers continued in the village and that Marsh Company never had any interest in them.

The legal title to the deposit was in . . Mr. Heywood, Jr.; the equitable title being in the Greenville Stone & Gravel Company, the bank was wholly wrong in attempting to apply the fund upon the account of a third party. See Zane on Banks & Banking, §140; Hollands v. Hi. Nicholas Nat'l Bank, 54 N. Y. 145.

Our conclusion on the facts and as to the relations of the parties disposes of all points made by counsel for the defendant.

We hold that plaintiff was properly entitled to interest, either upon the theory that there was an unreasonable and vexatious delay in withholding payment, or on the theory that interest will be allowed on money received to the use of another. See Marsh v. First State Nat. & Trust Co., 185 Ill. App. 28; Greenhoun Bros. & Co. v. Peters Com. Co., 176 Ill. App. 205; Brenner v. Gallagher, 193 Ill. 207.

We are of the opinion that the judgment is right and it is affirmed.

AFFIRMED.

290 - 22724

JAMES CROISDALE,
Appellee,

vs.

D. M. FARSON,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

204 I.A. 302

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit against defendant upon endorsements on certain stock certificates, had judgment for $3,900, from which defendant appeals.

The facts giving rise to the controversy are, that the Pocatello Electric Light & Power Company, an Illinois corporation, on November 16, 1903, issued its certificate to plaintiff for 240 shares of $100 each of its capital stock. There was endorsed on the back of this certificate when it was sold and delivered to plaintiff the following:

> "A dividend of five per cent. on the within stock has been guaranteed by the American Falls Power Light and Water Co., of Idaho.
>
> R. D. MANSON, Pr.
>
> "I hereby guarantee the payment of the above dividend during the life of James Croisdale.
>
> D. M. FARSON."

The suit is brought upon this guarantee of Farson, the defendant, who contends that this contract is for the payment of one dividend only of five per cent. on the stock, and no more, and that this has already been paid.

From the documents and testimony in evidence it is clearly proven that this was not the construction placed by the parties upon the contract, even if it should be conceded that there is any ambiguity therein. The parties acted upon this as an obligation on the part of Farson to pay a

JAMES CHRISTOPHER,
Appellee,

vs.

B. R. Kinney,
Appellant.

APPEAL FROM DUBUQUE DISTRICT COURT.

HON. COURT.

AFFIRMED.

H. PRESCOTT JOHNSON MOUNTNEY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit against defendant on endorsements on certain trunk certificates, had judgment for $5,000, from which defendant appeals.

The lower giving rise to the controversy is that the Louisville Electric Light Power Company, an Illinois corporation, on February 14, 1909, issued its certificate to plaintiff for the sum of $1,000 on the capital stock. Plaintiff was induced to accept of this certificate when it was sold and delivered to plaintiff the following:

"A dividend of 7 % per year, or [illegible] stock has been guaranteed by the [illegible] Light and Water Co., of Iowa.

[illegible]

"I hereby guarantee the payment of the above dividend during the life of this certificate."

The suit is brought upon a [illegible] of the guarantor, who contends that [illegible] of one dividend only of five per cent, [illegible] more, and that [illegible] strongly [illegible].

From the record [illegible] is clearly shown that [illegible] by the parties upon the contract, [illegible] conceded that there is any liability [illegible]. The writer noted upon this as an obligation on the part of [illegible]

dividend of five per cent. annually to the holder of the certificate during the lifetime of James Croisdale. It was also shown that this annual dividend was payable semi-annually, on the first day of February and on the first day of August, and that it was paid for a period of about eight years.

The parties having put their own construction on this obligation, defendant cannot now be heard to contend that the obligation was discharged by the payment merely of one dividend; all his letters indicate to the contrary. These letters of defendant sufficiently prove the allegations of the declaration with regard to the non-payment to plaintiff of the dividends claimed.

We think there was no error in the amount of the judgment. The plaintiff claimed the dividends for three years, the first of which was due February 1, 1912, the next February 1, 1913, and the next February 1, 1914. This would make $3,600, and adding interest on these installments at the rate of five per cent. would make the judgment properly for a larger sum than was entered.

There was no error upon the trial, and the judgment is affirmed.

AFFIRMED.

dividend of five per cent, namely in the order of the certificate during the life of the Corporation. It was also shown that this annual dividend was payable semi-annually, on the first day of February and on the first day of August, and that it was paid for a period of seven eight years.

The parties having put their own construction on this obligation, defendant cannot now be heard to contend that the obligation was discharged by the payment merely of one dividend; all his letters indicate the contrary. These letters of defendant sufficiently prove the allegations of the declaration with regard to the non-payment to plaintiff of the dividends claimed.

We think there was no error in the amount of the judgment. The plaintiff claimed the dividends for three years, the first of which was due February 1, 1910, the next February 1, 1911, and the next February 1, 1912. This would make $3,000, with accrued interest on these installments at the rate of five per cent. Hence the judgment properly for a larger sum than was asked.

There was no error upon the trial, and the judgment is affirmed.

AFFIRMED.

467 - 20799

2647

MARTIN LAVIN, Administrator of the Estate of THOMAS LAVIN, Deceased,
Appellee,

vs.

WELLS BROTHERS COMPANY,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

204 I.A. 303

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

On a petition filed by Martin Lavin, administrator of the estate of Thomas Lavin, deceased, under the Workmen's Compensation Act of 1911, arbitrators were appointed who met and heard evidence, and under the act entered an award in favor of the petitioner. From this award the respondent, Wells Brothers Company, appealed to the Superior Court of Cook County, where the cause was retried by the court without a jury and a finding was entered in favor of the petitioner and against the respondent in the sum of $3,500, payable in weekly installments of $8.61. Judgment was entered on this finding, and the respondent has brought the case to this court by appeal for review.

The evidence taken on the trial discloses that Thomas Lavin, deceased, on Sunday, January 12, 1913, was employed by respondent as a laborer in a large building which was in course of construction by the respondent as contractor for Butler Brothers. Deceased on the above date was working on the first floor of the building, carrying boards which were being used to build a shanty around a motor. He was last seen alive walking along the first floor of the building carrying planks, and he appeared to be looking for other planks. Ten or fifteen minutes later he was discovered lying in the basement of the building suffering from injuries from which he died four days later.

467 - 20799

MARTIN LAVIN, Administrator of the Estate of THOMAS LAVIN, Deceased, Appellee, vs. WELLS BROTHERS COMPANY, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

201 I.A. 203

MR. JUSTICE DAVIS DELIVERED THE OPINION OF THE COURT.

On a petition filed by Martin Lavin, administrator of the estate of Thomas Lavin, deceased, under the Workman's Compensation act of 1911, arbitrators were appointed who met and heard evidence, and under the act entered an award in favor of the petitioner. From this award the respondent, Wells Brothers Company, appealed to the superior Court of Cook County, where the cause was retried by the court without a jury and a finding was entered in favor of the petitioner and against the respondent in the sum of $3,500, payable in weekly installments of $8.81. Judgment was entered on said finding, and the respondent has brought the case to this court by appeal for review.

The evidence taken on the trial discloses that Thomas Lavin, deceased, on January 20, 1912, was employed by respondent as a laborer in a large building which was in course of construction by the respondent as contractor for Butler Brothers. Deceased on the above date was working on the first floor of the building, carrying boards which were being used to build a shanty around a motor. He was last seen alive walking along the first floor of the building carrying planks, and he appeared to be looking for other planks. Ten or fifteen minutes later he was discovered lying in the basement of the building suffering from injuries from which he died four days later.

The evidence tends to disclose that there were several unguarded holes or openings in the floor upon which deceased was working a short time before he was found in the basement.

A surgeon, testifying for respondent, stated that he examined deceased after he was removed to the hospital; that deceased had a fracture of the nose, at the junction of the frontal bone and the nasal bone near the sinuses, and a small fracture of the lower jaw on the right side, and some laceration of the chin and forehead.

It is urged by counsel for respondent that the evidence does not tend to prove that the injuries which deceased sustained and which caused his death arose out of his employment. We do not believe there is great merit in this contention. So far as the evidence discloses, the deceased just before the time he sustained the injuries was in the performance of his regular work for his employer. While it is not shown that any person saw the accident which resulted in the injuries causing death, it is fairly inferable from the evidence that such injuries were received by deceased as the result of a fall through one of several unguarded holes which existed in the first floor of the building in question. There were other employees working in and about the building at the time, yet no witness testified to any facts from which it might reasonably be concluded that the injuries sustained by deceased were inflicted in any other manner - as suggested by counsel for respondent. At an inquest held to inquire into the manner of deceased's death a coroner's jury returned a verdict in which they found, among other things, that deceased came to his death as the result of injuries received "when deceased fell, evidently from the first floor to the basement, while carrying or gathering boards to build a shanty in the Butler Building."

The evidence tends to disclose that there were several unguarded holes or openings in the floor upon which deceased was working a short time before he was found in the basement.

A surgeon, testifying for respondent, stated that he examined deceased after he was removed to the hospital; that deceased had a fracture of the nose, at the junction of the frontal bone and the nasal bone near the sinuses, and a small fracture of the lower jaw on the right side, and some laceration of the skin and forehead.

It is urged by counsel for respondent that the evidence does not tend to prove that the injuries which deceased sustained and which caused his death arose out of his employment. We do not believe there is great merit in this contention. So far as the evidence discloses, the deceased just before the time he sustained the injuries was in the performance of his regular work for his employer. While it is not clear that any person saw the accident which resulted in the injuries causing death, it is fairly inferable from the evidence that such injuries were received by deceased as the result of a fall through one of several unguarded holes which existed on the first floor of the building in question. There were other employees working in another portion of the building at the time, yet no witness testified to any facts from which it might reasonably be concluded that the injuries sustained by deceased were inflicted in any other manner - as is suggested by counsel for respondent. At an inquest held to investigate into the manner of deceased's death a corporal's jury returned a verdict in which they found, among other things, that deceased came to his death as the result of injuries received "when deceased fell, evidently from the third floor to the basement, while carrying or otherwise assisting to build a shanty in the Winter Buildings."

In Victor Chemical Works v. Industrial Board, 274 Ill. 11, it was held that where there was competent legal evidence to support a decision of the Industrial Board, it is not within the province of the courts to pass upon its sufficiency. We believe that the evidence taken on the trial in the case at bar fairly tends to show that the injuries and death of deceased arose out of his employment for respondent.

Deceased had for some time prior to his death contributed to some extent to the support of his parents who resided in Ireland. They were non-resident aliens, and it is urged that inasmuch as the evidence does not disclose that such parents were dependent upon deceased for support, there can be, under the act, no legal award in their favor. Paragraph A of section 4 of the act provides -

> "If the employee leaves any widow, child or children or parents or other lineal heirs to whose support he had contributed within five years previous to the time of his death, a sum equal to four times the average annual earnings of the employee, but not less in any event than $1,500 and not more in any event than $3,500."

Counsel for respondent in support of this contention rely upon Matecny v. Vierling Steel Works, 187 Ill. App. 448. An examination of this authority discloses that the mother of the deceased therein referred to was the sole beneficiary under the act, and it was held by the court that compensation for the pecuniary loss resulting from the death of a workman caused by injuries sustained by him in the course of his employment inured to the benefit of the surviving parent during his lifetime. This authority does not in any sense support the contention of counsel that dependency must be shown where recovery is sought under the act in favor of parents to whose support a deceased had

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"If the employee leaves any widow, child or children or parents or other lineal heirs to whom any-port he had contributed within five years previous to the time of his death, a sum equal to four times the average annual earnings of the employee, but not less in any event than $1,500 and not more in any event than $3,500."

Counsel for respondent in support of this construction rely upon Mateosky v. Vulcanite Steel Works, 187 Ill. App. 466. An examination of this authority discloses that the mother of the deceased herein referred to was a sole beneficiary under the act, and it was held by the court that compensation for the pecuniary loss resulting from the death of a workman caused by injuries sustained by him in the course of his employment inured to the benefit of the surviving parent during his lifetime. This authority does not in any sense support the contention of counsel that independency must be shown where recovery is sought under the act in favor of parents to whose support a deceased had

contributed within the period fixed by the act. The question under consideration here was not determined in the Matecny case; that case dealt in part with the question of whether the sum fixed in an award made under the act was payable in whole to the parent to whose support deceased had contributed; and, interpreting the act, the court held that the whole award was payable to the surviving parent, and that the surviving brothers and sisters, being collateral heirs, were not entitled to participate in the award under paragraph B of section 4 of the act, in the absence of any evidence tending to show that they had been dependent upon the earnings of the deceased.

Construing section 4 as a whole, we are inclined to the opinion that the legislature intended that in cases where a deceased employee had contributed in his lifetime to any of the class of persons referred to in paragraph A, it would be sufficient to authorize a recovery to show that deceased had contributed to the support of a person or of persons coming within the class enumerated in the paragraph, and that the right to recovery would not depend at all upon whether the class of persons referred to in paragraph A were dependent upon deceased for support. That this interpretation of the act is correct is further shown by paragraph B, which provides that in the case of collateral heirs such dependency upon deceased in a particular case must be shown. It is clear that the legislature intended that in the case of relatives such as those enumerated in paragraph A, they having a natural right to the aid and assistance of a deceased, it would be sufficient to show that he had contributed to their support; and that as to other relatives or heirs having no such natural claim, their

contributed within the period fixed by the act. The question under consideration here was not determined in the Matsony case; that case dealt in part with the question of whether the sum fixed in an award made under the act was payable in whole to the parent to whom support deceased had contributed; and, interpreting the act, the court held that the whole award was payable to the surviving parent, and that the surviving brothers and sisters, being collateral heirs, were not entitled to participate in the award under paragraph 3 of section 4 of the act, in the absence of any evidence tending to show that they had been dependent upon the earnings of the deceased.

Construing section 4 as a whole, we are inclined to the opinion that the legislature intended that in cases where a deceased employee had contributed in his lifetime to any of the class of persons referred to in paragraph A, it would be sufficient to substantiate a recovery to show that deceased had contributed to the support of a person or of persons coming within the class enumerated in the paragraph, and that the right to recovery could not depend at all upon whether the class of persons referred to in paragraph A were dependent upon deceased for support. That this interpretation of the act is correct is further shown by paragraph 3, which provides that in the case of collateral heirs such dependency must be proved in a particular case must be shown. It is clear that the legislature intended that in the case of relatives mentioned in paragraph A, they may be a natural right to the aid and assistance of a deceased. It would be sufficient to show that he had contributed to their support; in the case of other relatives or heirs having no such natural claim, more

right to recovery should depend upon their ability to show dependency upon deceased for such support.

It is further urged that there can be no recovery in this case because the parents of deceased are nonresident aliens. In the case of Victor Chemical Works v. Industrial Board, supra, the Supreme Court held that the words in the title of the act, "to promote the general welfare of the people of this State," do not necessarily mean that it is the intent and purpose of the act to limit compensation that may be paid for accidental injuries or death suffered in the course of employment to citizens of the State. It was urged in that case that the act did not apply to nonresident alien dependents, and the court held that "We think it is the plain meaning and intent of the act not to except alien beneficiaries from its provisions." This authority is decisive of this question.

It is also insisted that the trial court erred in admitting evidence relating to deceased's contribution to his parents. We do not think there was any reversible error committed by the court in this connection. The evidence of Martin Lavin fairly tended to show that the deceased had contributed to the support of his parents within five years prior to his death.

It is also said that error was committed in admitting in evidence the verdict of the coroner's jury. We think the verdict of the coroner's jury was properly admitted. Victor Chemical Works v. Industrial Board, supra.

Counsel argue that error was committed in fixing the amount of the award. The evidence tends to show that the earnings of deceased were $17.23 per week. There is contradiction in the evidence as to the usual length of time that

right to recover by should depend upon their ability to show dependency upon deceased for such support.

It is further urged that there can be no recovery in this case because the parents of deceased are non-resident aliens. In the case of Victor Chemical Works v. Industrial Board, supra, the Supreme Court held that the words in the title of the act, "to provide the general welfare of the people of this state," do not necessarily mean that it is the intent and purpose of the act to limit compensation that may be paid for accidental injuries or death suffered in the course of employment to citizens of the state. It was urged in that case that the act did not apply to nonresident alien dependents, and the court held that "We think it is the plain meaning and intent of the act not to except alien beneficiaries from its provisions." This authority is decisive of this question.

It is also insisted that the trial court erred in admitting evidence relating to decedent's contribution to his parents. It is not which were the only persons committed by the court in this connection. The evidence of Martin Levin fairly tends to show that the deceased had contributed to the support of his parents [illegible] in five years prior to his death.

It is also said that error was committed in admitting in evidence the verdict of the coroner's jury. [illegible] think the verdict of the coroner's jury [illegible] ted. Victor Chemical Works v. Industrial Board, supra.

Counsel argue that error was committed in fixing the amount of the award. The evidence tends to show that the earnings of deceased were $17.25 per week. There is contradiction in the evidence as to the amount of time that

deceased was employed in each year. Respondent's evidence tends to prove that deceased was usually unemployed during the months of December, January and February, although the testimony taken at the trial discloses that the deceased was actually employed by the respondent during those months, and that he met his death while working for respondent in the month of January, 1913. There is evidence in the record in support of the findings of the court upon this question.

Other rulings of the trial court are complained of, as to which we are of opinion that no error was committed that would warrant the reversal of a judgment which seems to be fairly supported by the law and the evidence of the case.

The judgment of the Superior Court is affirmed.

AFFIRMED.

deceased was employed in each year. Respondent's evidence tends to prove that deceased was usually unemployed during the months of December, January and February, although the testimony taken at the trial discloses that the deceased was actually employed by the respondent during those months, and that he met his death while working for respondent in the month of January, 1913. There is evidence in the record in support of the findings of the court upon this question.

Other rulings of the trial court are complained of, as to which we are of opinion that no error was committed that would warrant the reversal of a judgment which seems to be fairly supported by the law and the evidence of the case.

The judgment of the Superior Court is affirmed.

AFFIRMED.

171 - 22598

EDWIN B. HOLMES, EDWARD A. PERKINS, CHARLES A. PERKINS, EDWARD W. PERKINS and EDWIN P. HOLMES, trading as Parker, Holmes & Co.,
Plaintiffs in Error,

vs.

SAMUEL J. F. STRAUS, Administrator of the Estate of I. W. BRILL, Dec'd,
Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

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259 - 22693

EDWIN B. HOLMES et al., trading as Parker, Holmes & Co.,
Appellants,

vs.

SAMUEL J. F. STRAUS, Administrator, etc.,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

On February 28, 1912, suit was begun in the Municipal Court of Chicago by the plaintiffs, a partnership, doing business in the city of Boston, against I. W. Brill, now deceased, for $698.03. For some time before suit was begun Brill had been employed by plaintiffs as a traveling salesman. Brill filed an affidavit of defense to plaintiffs' claim, and also a claim of set-off against the plaintiffs in the sum of $3,753.33. Plaintiffs, by their attorney, Charles H. Burras, filed an affidavit of defense to the claim of set-off. Some months following the commencement of the suit Burras, attorney for plaintiffs, employed Henry A. Fowler, an attorney, to take charge of the case. The correspondence in the record discloses that plaintiffs' Boston attorney knew of the employment of Fowler,

171 - 22598

EDWIN H. HOLMES, EDWARD A. PERKINS, CHARLES A. FERRING, EDWARD W. PERKINS and EDWIN F. HOLMES, trading as Parker, Holmes & Co.,
Plaintiffs in Error,

vs.

SAMUEL J. F. STRAUS, Administrator of the Estate of I. W. BRILL, Deceased,
Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

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259 - 22595

EDWIN H. HOLMES et al., trading as Parker, Holmes & Co.,
Appellants,

vs.

SAMUEL J. F. STRAUS, Administrator, etc.,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE DAVID DUNCAN DELIVERED THE OPINION OF THE COURT:

On February 26, 1912, suit was begun in the Municipal Court of Chicago by the plaintiffs, a partnership, doing business in the city of Boston, against I. W. Brill, now deceased, for $538.03. For some time before suit was begun Brill had been employed by plaintiffs as a traveling salesman. Brill filed an affidavit of defense to plaintiffs' claim, and also a claim of set-off against the plaintiffs in the sum of $4,788.02. Plaintiffs, by their attorney, Charles S. Burke, filed an affidavit of defense to the claim of set-off. Some months following the commencement of the suit Burke, attorney for plaintiffs, employed Henry A. Fowler, an attorney, to take charge of the case. The correspondence in the record discloses that plaintiffs' Boston attorney knew of the employment of Fowler.

although Fowler's employment and authority to represent plaintiffs does not appear of record in the case.

At the taking of certain depositions in Boston, Brill being there represented by an attorney named Jacobs, and the plaintiffs by an attorney named Knowlton,-Brill's attorney insisted on plaintiffs proving all of the items in an intricate account extending over several years. On April 10, 1913, Knowlton wrote Fowler in Chicago, advising among other things that an effort be made in Chicago to settle the controversy. Fowler does not appear to have written any answer to this letter, but he says he talked to Mr. Kaplan, Brill's Chicago attorney, about a settlement; that it was proposed between the lawyers that if each side would agree to dismiss their respective claims the matter could be disposed of. Brill refused to accept this proposition, and the taking of the depositions at Boston was never completed. Brill and Perkins, one of the plaintiffs, held a conversation in Chicago about a year after the attempt on the part of plaintiffs to take the depositions in Boston. Brill said that at this time Perkins stated that plaintiffs had abandoned the suit; this part of the conversation is denied by Perkins. No further effort was made, however, to complete the taking of the depositions, and it does not appear that plaintiffs, by their counsel, Fowler or Knowlton, made any attempt to prepare for a trial of the case.

In February, 1915, Leonard L. Cowan, an attorney, was substituted in the place of Kaplan as attorney of record for Brill; and whether the plaintiffs or their counsel received legal notice of this substitution is a much disputed question. Notice of the withdrawal of Kaplan and the sub-

although Towler's employment and authority to represent plaintiffs does not appear of record in the case.

At the taking of certain depositions in Boston, Brill being there represented by an attorney named Jacobs, and the plaintiffs by an attorney named Knowlton.-Brill's attorney insisted on plaintiffs proving all of the items in an intricate account extending over several years. On April 10, 1913, Knowlton wrote Towler in Chicago, advising among other things that an effort be made in Chicago to settle the controversy. Towler does not appear to have written any answer to this letter, but he says he talked to Mr. Kaplan, Brill's Chicago attorney, about a settlement; that it was proposed between the lawyers that if each side would agree to dismiss their respective claims the matter could be disposed of. Brill refused to accept this proposition, and the taking of the depositions at Boston was never completed. Brill and Jerkins, one of the plaintiffs, held a conversation in Chicago about a year after the attempt on the part of plaintiffs to take the depositions in Boston. Brill said that at this time Jerkins stated that plaintiffs had abandoned the suit; this part of the conversation is denied by Jerkins. So further effort was made, however, to complete the taking of the depositions, and it does not appear that plaintiffs, by their counsel, Towler or Knowlton, made any attempt to prepare for a trial of the case.

In February, 1915, Leonard L. Cohen, an attorney, was substituted in the place of Kaplan as attorney of record for Brill; and whether the plaintiffs or their counsel received legal notice of this substitution is a much disputed question. Notice of the withdrawal of Kaplan and the sub-

stitution of Cowan was addressed to Burras and to Fowler, in which it was stated that Cowan would appear in court on February 15, 1915, and move for the entry of an order allowing the substitution. The case had been reached for trial 19 times prior to February 15, 1915, and had been continued or passed.

Mr. Fowler, testifying concerning the service of the notice, said that when Cowan brought the notice to him he told Cowan that it was Burras' case and that he would have to see Burras; that if Kaplan was out of the case he, Fowler, would have nothing further to do with it; that he, Fowler, had called up Burras on February 13, 1915; that he could not say whether he had talked with Burras himself or not, but that he did leave word that "I had got this notice." Neither Burras nor Fowler paid any further attention to the case until August, 1915.

The record discloses that the cause had been continued several times following the substitution of attorneys and until May 6, 1915, when judgment was entered in favor of the defendant on his set-off. The case appeared upon the published trial call for several days before judgment was entered, under the correct number but under the title "Packer v. Bull."

The judgment order recites:

> "This cause coming on to be heard upon the regular trial call of this date, and it appearing to the court that this suit was started as a fourth class suit, and that a set-off has been filed herein for the sum of $3,753.53. It is ordered that said set-off be allowed to stand upon the payment by said defendant of the usual costs required to be paid by plaintiff in cases of the first class in this court.
>
> * * * * * * *
>
> "Now comes the defendant in this cause, the plaintiffs being absent and not represented, and thereupon this cause comes on in regular course for trial before the court without a jury, and the court having heard the evi-

stitution of Cowan was addressed to Burrus and to Fowler, in which it was stated that Cowan would appear in court on February 15, 1915, and move for the entry of an order allowing the substitution. The case had been reached for trial 13 times prior to February 15, 1915, and had been continued or passed.

Mr. Fowler, testifying concerning the service of the notice, said that when Cowan brought the notice to him he told Cowan that it was Burrus' case and that he would have to see Burrus; that if Hagman was out of the case he, Fowler, would have nothing further to do with it; that he, Fowler, had called up Burrus on February 15, 1915; that he could not say whether he had talked with Burrus himself or not, but that he did leave word that "I had got this notice." Neither Burrus nor Fowler paid any further attention to the case until August, 1915.

The record discloses that this cause had been continued several times following the substitution of attorneys and until May 6, 1915, when judgment was entered in favor of the defendant on his set-off. The case appeared upon the published trial call for several days before judgment was entered, under the correct number but under the title "Parker v. Hull."

The judgment order recites:

"This cause coming on to be heard upon the regular trial call of this date, and it appearing to the court that this suit was entered as a fourth class suit, and that a set-off had been filed herein for the sum of $3,755.85. It is ordered that said set-off is allowed to stand upon the payment by said defendant of the usual costs required to be paid by plaintiff in cases of the first class in this court.

* * * * * * *

"Now comes the defendant in this cause, the plaintiff being absent and not represented, and thereupon this cause comes on in regular course for trial before the court without a jury, and the court having heard the evi-

dence and the arguments of counsel, and being fully advised in the premises, enters the following finding, to-wit: The court finds the issues against the plaintiffs on defendant's claim of set-off, and assesses the defendant's damages at the sum of $3,753.53."

In August, 1915, plaintiffs were first apprised of this judgment, and they at once sought information of their attorney, Burras, and their Boston attorney wrote Fowler asking for an explanation of the matter.

On September 21, 1915, plaintiffs filed a petition to vacate the judgment entered May 6, 1915. An answer to this petition was filed, and a replication was also filed to the answer. On July 13, 1916, an order was entered of record which provided, in substance, that the motion to vacate the judgment "be denied and that the petition to vacate said judgment be dismissed," and that "the court having heard the evidence of both parties and the arguments of counsel finds:

"First. That the court had jurisdiction to enter the judgment sought to be set aside.

Second. That there was neither fraud, accident nor mistake in the entry of said judgment.

Third. That by negligence of the plaintiffs and their attorneys they failed to prosecute their case; they neglected to take the steps necessary to have it ready for trial; they failed and neglected to watch their case when it appeared in its regular place on the trial call and failed and neglected to be present on the hearing of said case."

An appeal from this order of the Municipal Court has been taken to this court by plaintiffs, who also bring here by writ of error for review the original judgment of the Municipal Court in favor of the defendant. The appeal, being General No. 22693, and the writ of error, No. 22598, have by order of court been consolidated for hearing.

It is urged by the plaintiffs that the judgment and order should both be reversed and the cause remanded for

dence and the arguments of counsel, and being fully advised in the premises, enters the following finding, to-wit: The court finds the issues against the plaintiffs on defendant's claim of set-off, and assesses the defendant's damages at the sum of $3,783.53."

In August, 1915, plaintiffs were first apprised of this judgment, and they at once sought information of their attorney, Burrus, and their Boston attorney wrote Towler asking for an explanation of the matter.

On September 21, 1915, plaintiffs filed a petition to vacate the judgment entered May 6, 1915. An answer to this petition was filed, and a replication was also filed to the answer. On July 13, 1916, an order was entered of record which provided, in substance, that the motion to vacate the judgment "be denied and that the petition to vacate said judgment be dismissed," and that "the court having heard the evidence of both parties and the arguments of counsel finds:

"First. That the court had jurisdiction to enter the judgment sought to be set aside.

Second. That there was neither fraud, accident nor mistake in the entry of said judgment.

Third. That by negligence of the plaintiffs and their attorneys they failed to prosecute their case; they neglected to take the steps necessary to have it ready for trial; they failed and neglected to watch their case when it appeared in its regular place on the trial call and failed and neglected to be present on the hearing of said case."

An appeal from this order of the Municipal Court has been taken to this court by plaintiffs, who also bring here by writ of error for review the original judgment of the Municipal Court in favor of the defendant. The appeal, being General No. 22623, and the writ of error, No. 22624, have by order of court been consolidated for hearing.

It is urged by the plaintiffs that the judgment and order should both be reversed and the cause remanded for

a new trial, for the reason that the Municipal Court had no jurisdiction to enter the order in question and that it had, under the circumstances of the case, exceeded its jurisdiction at the time it entered the judgment; and, second, that the judgment against plaintiffs should be set aside in that it was the result of either fraud, accident or mistake.

In support of their first contention plaintiffs urge that the Municipal Court had no power to hear and determine the defendant's cross-demand "except it was commenced and prosecuted as a first class cause"; that the filing of the counter claim of the defendant, in a suit brought by the plaintiffs to recover a judgment in a fourth class cause of action, was in legal effect a mere nullity; that the claim of defendant which it was sought to set off against the plaintiffs' demand was for the sum of $3,753.53; that the defendant's claim of set-off could not be enforced in the action brought by plaintiffs, and that the court was without jurisdiction, or exceeded its jurisdiction, when it entered an order directing the clerk of the court to transfer the set-off demand of the defendant from a fourth class to a first class claim; and that in any event counsel for plaintiffs should have received notice of the motion to so transfer the claim of defendant. The clerk by direction of the court gave to the set-off claim of defendant a new general number. The cause, in the absence of plaintiffs, thereupon proceeded to trial and judgment.

It is insisted on the one hand that the power of the court to enter the order in question was jurisdictional - that the court was wholly without power to enter the order. On the other hand it is urged that it is not a question of jurisdiction in any sense, but that it is merely a matter of legal procedure.

a new trial, for the reason that the Municipal Court had no jurisdiction to enter the order in question and that it had, under the circumstances of the case, exceeded its jurisdiction at the time it entered the judgment; and, second, that the judgment against plaintiffs should be set aside in that it was the result of either fraud, accident or mistake.

In support of their first contention plaintiffs urge that the Municipal Court had no power to hear and determine the defendant's cross-demand "except it was commenced and prosecuted as a first class cause"; that the filing of the counter claim of the defendant, in a suit brought by the plaintiffs to recover a judgment in a fourth class cause of action, was in legal effect a mere nullity; that the claim of defendant which it was sought to set off against the plaintiffs' demand was for the sum of $3,757.58; that the defendant's claim of set-off could not be enforced in the action brought by plaintiffs, and that the court was without jurisdiction, or exceeded its jurisdiction, when it entered an order directing the clerk of the court to transfer the set-off demand of the defendant from a fourth class to a first class claim; and that in any event counsel for plaintiffs should have received notice of the motion to so transfer the claim of defendant. The clerk by direction of the court gave to the set-off claim of defendant a new general number. The cause, in the absence of plaintiffs, thereupon proceeded to trial and judgment.

It is insisted on the one hand that the power of the court to enter the order in question was jurisdictional - that the court was wholly without power to enter the order. On the other hand it is urged that it is not a question of jurisdiction in any sense, but that it is merely a matter of legal procedure.

Section 2 of the Municipal Court Act gives that court jurisdiction in cases which are, by the act, divided into six classes, and a separate practice and procedure is provided for each class of cases. The jurisdiction in first class cases is limited generally to cases where it is sought to recover an amount in excess of $1,000, either in money or personal property; and in cases of the fourth class the jurisdiction is limited to cases where the amount sued for is not greater than $1,000.

In Chicago Title & Trust Co. v. Kemler Lumber Co., 151 Ill. App. 579, a plea of set-off for $2,000 was stricken from the files in a fourth class case. Deciding the case the court said:

> "This action is of the fourth class in the Municipal Court and the claim of set-off would come within those causes cognizable as of the first class. Had the plea of set-off been such as to have brought the cross-cause into the fourth class under the Municipal Court Act, then the plea should have been allowed to stand; but it clearly came within another class and was not, for that reason, germane to the main suit or a proper subject of counter-claim. No written pleadings were required in the main suit, while such pleadings are made necessary in cases of the first class, of which class was defendant's counterclaim. In the two classes different scales of costs obtain."

Since the above decision was written the Municipal Court has adopted the rule following:

> "In all cases of the first class instituted in this court on and after April 1, 1910, the pleadings shall be the same as in the cases of the fourth class, and they may be amended in the same manner."

The adoption of this rule by the Municipal Court has abolished practically every difference that formerly existed in the practice and procedure in that court in cases of the fourth and first classes. It is true that there still exist under the act somewhat different scales of costs applicable to cases of these different classes, but we do not think that this difference is of such nature as to warrant a holding that

Section 2 of the Municipal Court Act gives that court jurisdiction in cases which are, by the act, divided into six classes, and a separate practice and procedure is provided for each class of cases. The jurisdiction in first class cases is limited generally to cases where it is sought to recover an amount in excess of $1,000, either in money or personal property; and in cases of the fourth class the jurisdiction is limited to cases where the amount sued for is not greater than $1,000.

In Chicago Title & Trust Co. v. Rosalie Lumber Co., 151 Ill. App. 279, a plea of set-off for $2,000 was stricken from the files in a fourth class case. Deciding the case the court said:

> "This action is of the fourth class in the Municipal Court and the claim of set-off would come within those cases cognizable as of the first class. Had the plea of set-off been such as to have brought the cross-cause into the fourth class under the Municipal Court Act, then the plea should have been allowed to stand; but it clearly came within another class and was not, for that reason, germane to the main suit or a proper subject of counter-claim. No written pleadings were required in the main suit, while such pleadings are made necessary in cases of the first class, of which class, was defendant's counterclaim. In the two classes different modes of costs obtain."

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> "In all cases of the first class instituted in this court on and after April 1, 1911, the pleadings shall be the same as in the cases of the fourth class, and they may be amended in the same manner."

The adoption of this rule by the municipal court has abolished practically every difference that formerly existed in the practice and procedure in that court in cases of the fourth and first classes. It is true that there still exists under the act somewhat different modes of costs applicable to cases of these different classes, but we do not think that this difference is of such nature as to warrant a holding that

a set-off arising under one of these classes may not legally be urged in a suit brought under another of such classes. Under the rules of the Municipal Court as they now are, there is no substantial difference in the practice in cases of the first class and cases of the fourth class; and hence we are inclined to agree with counsel for defendant that the court did have inherent power to enter the order herein complained of; in other words, the question presented here is one of practice and procedure.

It is provided by section 52 of the Municipal Court Act that where the method of procedure is not sufficiently prescribed by the act or by any rule of the court, the court may make such provision for the conduct and disposition of a case as may appear to the court proper for the just determination of the rights of the parties. The rules of the Municipal Court are silent with reference to the power of the court to enter the order here in question, and we are inclined to the opinion that in view of the adoption of Rule 14, above quoted, the trial judge had the power to enter the order in question.

It is further earnestly insisted by counsel for plaintiffs that neither plaintiffs nor their counsel have been guilty of such negligence as precludes their right to relief as set forth in their petition to vacate the judgment in favor of defendant. We believe that the evidence heard on the motion to vacate this judgment does not support this contention. The record discloses that from the time the suit was begun until the judgment was entered on May 6, 1915, the cause had been continued no less than 22 times. Mr. Burras, attorney for plaintiffs, had, with the subsequent knowledge of the local attorney

a set-off arising under one of these clauses may not le-
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It is provided by section 52 of the Municipal
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It is further earnestly insisted by counsel
for plaintiffs that neither plaintiffs nor their counsel
have been guilty of such negligence as precludes their
right to relief as set forth in their petition to vacate
the judgment in favor of defendant. We believe that the
evidence heard on the motion to vacate this judgment does
not support this contention. The record discloses that
from the time the suit was begun until the judgment was
entered on May 6, 1913, the cause had been continued no
less than 23 times. Mr. Barnes, attorney for plaintiffs,
had, with the subsequent knowledge of the local attorney

of plaintiffs in Boston, employed Mr. Fowler to represent plaintiffs in the proceedings in the Municipal Court. Mr. Burras from that moment paid no further attention to the case, and the attorney whom he employed to do this work for him never filed his appearance in the cause. It is quite true that during part of the time that the case was pending counsel for the parties had under discussion a proposition for the settlement of the controversy, but this fact in and of itself did not authorize counsel for the plaintiffs to assume anything with reference to the time or manner of the final disposition of the cause. Brill, the defendant, at no time authorized his counsel - nor did his counsel seem to have the authority - to settle the controversy on the terms proposed. That a tentative suggestion for a settlement was pending is without doubt, but we do not think that this fact justified counsel for plaintiffs to relax in the vigilance that they should have exercised in protecting the rights of their clients.

The record discloses that there was some question as to whether either Burras or Fowler had been notified of the substitution of Mr. Cowan as attorney for Brill. Fowler admits that he had such notice two days before the order of substitution was entered, and he further testifies that he notified Mr. Burras, or someone in Burras' office, of the application that was to be made on February 15, 1915, for the entry of the order. Fowler having received this notice and, as he says, having communicated it to Mr. Burras, it next appears that neither Mr. Burras nor any other person on behalf of the plaintiffs made any move to protect the rights of plaintiffs until the August succeeding. The cause was continued three or four times following February 15, 1915, when the order was entered, and prior to the entry of the judgment

of plaintiffs in Boston, employed Mr. Bowler to represent plaintiffs in the proceedings in the Municipal Court. Mr. Burrus from that moment paid no further attention to the case, and the attorney whom he employed to do this work for him never filed his appearance in the cause. It is quite true that during part of the time that the case was pending counsel for the parties had under discussion a proposition for the settlement of the controversy, but this fact in and of itself did not authorize counsel for the plaintiffs to assume anything with reference to the time or manner of the final disposition of the cause. Still, the defendant, by no time authorized his counsel - nor did his counsel seem to have the authority - to settle the controversy on the terms proposed. That a tentative suggestion for a settlement was pending is without doubt, but we do not think that this fact justified counsel for plaintiffs to relax in the vigilance that they should have exercised in protecting the rights of their clients.

The record discloses that there was some question as to whether either Burrus or Fowler had been notified of the substitution of Mr. Cowan as attorney for Brill. Fowler admits that he had such notice two days before the order of substitution was entered, and he further testifies that he notified Mr. Burrus, or someone in Burrus' office, of the disposition that was to be made on February 15, 1923, for the entry of the order. Fowler having received this notice and, as he says, having communicated it to Mr. Burrus, it must appear that neither Mr. Burrus nor any other person on behalf of the plaintiffs made any move to protect the rights of plaintiffs until the August proceeding. The cause was continued three or four times following February 15, 1921, when the order was entered, and prior to the entry of the judgment

on May 6, 1915, and the case appeared on the trial call of the court several days before it was finally reached for trial. While it is evident that there was an error in the published trial call of the Municipal Court in the title of the case, it is conceded that the correct number of the case was given therein, and we are inclined to believe that this was sufficient notice to plaintiffs' counsel. It should be borne in mind that the judgment was entered when the case, in its order, was reached upon the trial call of the Municipal Court, and that court had the power during the course of the trial - if it can be said that the question here under consideration was one of procedure - to enter any order which it had jurisdiction to enter, without special notice to the plaintiffs or their counsel; in other words, the law presumes, in the absence of fraud, accident or mutual mistake, that all parties interested in a cause are present in court during the course of the trial. Counsel for plaintiffs seem to admit in their brief that the Municipal Court had the power to enter the order for a transfer of the set-off claim from the fourth to the first class. In their petition to set the judgment aside they ask that the case be re-heard by the Municipal Court on plaintiffs' demand and upon the defendant's cross-demand, and, so far as we are able to discover from the records brought here, the contention that the court was without power to enter the order complained of is first made by plaintiffs in this court.

The Municipal Court had power to enter the order in question, and the plaintiffs had ample opportunity to be present in court at the time of the trial of the cause had they or their attorneys been exercising due care and diligence. The order of the Municipal Court in General No.22693 and the judgment of that court in General No.22598 are affirmed.

AFFIRMED.

Mr. Justice Holdom dissents.

on May 6, 1919, and the case appeared on the trial call of the court several days before it was finally reached for trial. While it is evident that there was an error in the published trial call of the Municipal Court in the title of the case, it is conceded that the correct number of the case was given therein, and we are inclined to believe that this was sufficient notice to plaintiffs' counsel. It should be borne in mind that the judgment was entered when the case, in its order, was reached upon the trial call of the Municipal Court, and that court had the power during the course of the trial, if it can be said that the question here under consideration was one of procedure - to enter any order which it had jurisdiction to enter, without special notice to the plaintiffs or their counsel; in other words, the law presumes, in the absence of fraud, accident or mutual mistake, that all parties interested in a cause are present in court during the course of the trial. Counsel for plaintiffs seem to admit in their brief that the Municipal Court had the power to enter the order for a transfer of the set-off claim from the fourth to the first class. In their petition to set the judgment aside they ask that the case be re-heard by the municipal court on plaintiffs' demand and upon the defendant's cross-demand, and, so far as we are able to discover from the records brought here, the contention that the court was without power to enter the order complained of is first made by plaintiffs in this court.

The Municipal Court had power to enter the order in question, and the plaintiffs had ample opportunity to be present in court at the time of the trial of the cause had they or their attorneys been exercising due care and diligence. The order of the Municipal Court in General No.[illegible] and the judgment of that court in General No. [illegible] are affirmed.

AFFIRMED.

Mr. Justice [illegible]

239 - 22673

PEOPLE OF THE STATE OF ILLINOIS,
for use of HERSCHEL M. BYALL,
Admr. Estate of Amy Young, decd.,
Appellant,

vs.

ANNA M. RIGDON and FEDERAL UNION
SURETY COMPANY,
Appellees.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

204 I.A. 309

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an action brought by plaintiff against the defendants on an administrator's bond. The amended declaration consists of two counts, in the first of which it is alleged that the defendant Anna M. Rigdon on July 30, 1910, was appointed administratrix of the estate of Charles W. Rigdon, deceased, by the Probate Court of Cook County, Illinois; that she executed her administratrix' bond in the sum of $15,000, with the Federal Union Surety Company, a defendant, as surety, conditioned that if she should well and truly administer all the goods, etc., of the estate and should distribute the same to the persons and parties entitled thereto, then the obligation of the bond was to be void.

As a breach of the conditions of the bond it was alleged that Charles W. Rigdon, deceased, died intestate July 15, 1910, leaving him surviving as his only heirs at law the said Anna M. Rigdon, his widow, and Jay A. Rigdon, his son; that on February 3, 1911, the said Anna M. Rigdon filed an inventory from which it appeared that there had come into her possession as administratrix assets belonging to the estate of her deceased husband of the value of $46,026.50; that said inventory was approved by the Probate Court; that on February 11, 1911, the said Jay A. Rigdon, for

PEOPLE OF THE STATE OF ILLINOIS, for use of MARGUERITE E. RYAN, Admr. Estate of Amy Young, deed., Appellant,	
vs.	APPEAL FROM APPELLATE COURT, COOK COUNTY.
ANNA M. RIGDON and FEDERAL UNION SURETY COMPANY, Appellees.	

MR. JUSTICE DRAKE DELIVERED THE OPINION OF THE COURT.

This is an action brought by plaintiff against the defendants on an administrator's bond. The amended declaration consists of two counts, in the first of which it is alleged that the defendant Anna M. Rigdon on July 30, 1910, was appointed administratrix of the estate of Charles W. Rigdon, deceased, by the Probate Court of Cook County, Illinois; that she executed her administrative bond in the sum of $15,000, with the Federal Union Surety Company, a defendant, as surety, conditioned that if she should well and truly administer all the goods, etc., of the estate and should distribute the same to the persons and persons entitled thereto, then the obligation of the bond was to be void.

As a breach of the conditions of the bond it was alleged that Charles W. Rigdon, deceased, died intestate July 15, 1910, leaving him surviving as his only heir at law the said Anna M. Rigdon, his widow, [illegible] his son; that on February 3, 1911, [illegible] filed an inventory from which it appeared [illegible] came into her possession as administratrix assets belonging to the estate of her deceased husband of the value of $46,026.50; that said inventory was approved by the Probate Court; that on February 11, 1911, she said Anna M. Rigdon, for

a valuable consideration, assigned to Amy Young, plaintiff's intestate, all his right, title and interest in and to the estate of Charles W. Rigdon, deceased; that said interest consisted of an undivided two-thirds of said estate remaining after the payment of certain debts, costs, etc.; that due notice of such sale and assignment was given to said Anna M. Rigdon, administratrix, and that said sale and assignment was spread of record on the records of the Probate Court of Cook County, which fact was also known to the said Anna M. Rigdon; that on January 31, 1913, the said Anna M. Rigdon filed in the Probate Court her final account from which it appeared that she had in her hands and possession the distributive share of the said Jay A. Rigdon in said estate of the value of $20,000, and that said Jay A. Rigdon would have been entitled to receive said property as his distributive share of the estate of said Charles W. Rigdon but for his sale and assignment to the said Amy Young, deceased; that on March 13, 1913, an order was entered of record by the Probate Court directing the distribution of the property in the hands of the said administratrix to the parties entitled thereto; that subsequently a further order was entered in said court in said estate as follows:

> "Now comes Anna M. Rigdon, administratrix of the estate of Charles W. Rigdon, deceased, and the court being fully advised in the premises, it is ordered, adjudged and decreed that Anna M. Rigdon, administratrix, deliver to Jay A. Rigdon, heir at law of Charles W. Rigdon, deceased, all the property and assets now in her hands belonging to said heir in said estate."

It is further alleged in said count in substance that at the time said orders were entered there were no assets in the hands of said Anna M. Rigdon, administratrix, belonging to the said Jay A. Rigdon, and that by reason of the orders of the Probate Court it became the duty of said Anna M.

a valuable consideration, sent and to my young, plaintiff's interests, all his right, title and interest in and to the estate of Charles E. Higgon, deceased; that said interest consisted of an undivided two-thirds of said estate remaining after the payment of certain debts, etc., etc.; that due notice of such sale and assignment was given to said Anna E. Higgon, administratrix, and that said sale and assignment was entered of record on the records of the Probate Court of Cook County, which fact was also known to the said Anna E. Higgon; that on January 31, 1918, the said Anna E. Higgon filed in the Probate Court her final account from which it appears that she has in her hands and possession the distributive share of the said Jay A. Higgon in said estate of the value of $2,000, and that said Jay A. Higgon would have been entitled to receive said property as his distributive share of the estate of said Charles E. Higgon but for his sale and assignment to one said Jay Jones, deceased; that on March 12, 1918, an order was entered of record by the Probate Court directing the distribution of the property in the hands of the said administratrix to the persons entitled thereto; that subsequently a further order was entered in said court in said estate as follows:

"Now comes Anna E. Higgon, administratrix of the estate of Charles E. Higgon, deceased, and the court being fully advised in the premises, it is ordered, adjudged and decreed that Anna E. Higgon, administratrix, deliver to Jay A. Higgon, heir at law of Charles E. Higgon, deceased, all the property and assets now in her hands belonging to said heir in said estate."

It is alleged in said bill of complaint that at the time that orders were entered in said estate in the month of said Anna E. Higgon, administratrix, delivering to the said Jay A. Higgon, and that by reason of the orders of the Probate Court it became the duty of said Anna E.

Rigdon to deliver the property in question to the said Amy Young, but that this she has failed and refused to do; that since April 25, 1915, the said Amy Young died intestate, and the said Herschel M. Byall, plaintiff herein, was appointed administrator of her estate.

The second count of the declaration is identical with the first except that it alleges the giving of an additional bond, with the Federal Union Surety Company, defendant, as surety.

The court sustained demurrers to this amended declaration, and the plaintiff having elected to stand by his declaration judgment was entered in favor of the defendants, and the case is brought here by appeal for review.

The only question in controversy here is as to the power of the Probate Court to determine "the validity of a disputed assignment by an heir of his interest in a decedent's estate, or to adjudicate the conflicting claims of the parties to such assignment." Section 220, chapter 37, Hurd's 1916 Revised Statutes, provides as follows:

> "Probate Courts shall have original jurisdiction in all matters of probate, the settlement of estates of deceased persons, the appointment of guardians and conservators and settlement of their accounts, and in all matters relating to apprentices, and in cases of the sales of real estate of deceased persons for the payment of debts."

Counsel for plaintiff insist that the decision of this appeal depends upon whatever construction may be given by the court to the language, "jurisdiction in all matters of probate," and "the settlement of the estates of deceased persons," as this language is used in the above section. In Frackelton v. Masters, 249 Ill. 30, relied upon by plaintiff, the court held that the attempt of the legislature to invest probate courts with general equity juris-

Higdon to deliver the property in question to one said Amy Young, but that this she has failed and refused to do; that since April 25, 1916, the said Amy Young died intestate, and the said Herschel V. Hyatt, plaintiff herein, was appointed administrator of her estate.

The second count of the declaration is identical with the first except that it alleges the giving of an additional bond, with the Federal Union Surety Company, defendant, as surety.

The court sustained demurrers to this amended declaration, and the plaintiff having elected to stand by his declaration judgment was entered in favor of the defendants, and the case is brought here by appeal for review.

The only question in controversy here is as to the power of the Probate Court to determine the validity of a disputed assignment by an heir of his interest in a decedent's estate, or to adjudicate the conflicting claims of the parties to such assignment. Section 2[illegible], chapter 37, Hurd's 1916 Revised Statutes, provides as follows:

> "Probate courts shall have original jurisdiction in all matters of probate, the settlement of estates of deceased persons, the appointment of guardians and conservators and settlement of their accounts, and in all matters relating to wills, to order sales of real estate for payment of debts, and for the partition and distribution of the real estate of deceased persons among the heirs or persons entitled thereto, and to grant letters testamentary, letters of administration, letters of guardianship and letters of conservatorship, and to revoke the same for cause, and generally to transact all probate business."

Counsel for plaintiff insist that the statutory grant of this appellate jurisdiction to the Probate Court is given by the court to the language, "determination in all matters of probate," and "settlement of the estates of deceased persons," as this language is used in the first section. In Kronkelton v. Hastings, 240 Ill. 3[illegible], relied upon by plaintiff, the court held that the statutes of the legislature to invest probate courts with concurrent equity juris-

diction in such manner as to give them control and supervision over testamentary trusts was illegal. An examination of this authority will disclose that the Supreme Court was of the opinion that the legislature had attempted to clothe the Probate Court with a general equity jurisdiction with relation to questions not in their nature "probate matters" within the meaning of section 20 of article 6 of the State constitution. "'Probate matters,' as used in the constitution, mean matters pertaining to the settlement of the estates of deceased persons. The administration of testamentary trusts has no more relation to the settlement of the estates of deceased persons than the foreclosure of mortgages * *."

The settlement of the matter in controversy here became a condition precedent to a final settlement of the estate of the deceased, Charles W. Rigdon. While this question was left open, if counsel for the defendants is correct in his contention that the Probate Court had no jurisdiction to determine the matter, the administratrix of the estate could not have presented her final account for approval without first assuming the responsibility of determining the rights of rival claimants to a distributive share of said estate.

In Shephard v. Clark, 38 Ill. App. 66, it appears that a testator by his will provided that his estate should be divided into nine equal parts, one part to be paid to each of his living children, etc. The lands of the testator were sold under the direction of the County Court. One Millie Clark filed her petition in that court alleging that one of the said children had sold to her all of his interest in the land of the decedent, and she prayed in the petition for a share of the proceeds of the sale of the lands.

diction in such manner as to give them control and supervision over testamentary trusts was illusory. An examination of this authority will disclose that the Supreme Court was of the opinion that the legislature had attempted to clothe the Probate Court with a general equity jurisdiction with relation to questions not in their nature "probate matters" within the meaning of section 20 of article 6 of the state constitution. "'Probate matters,' as used in the constitution, mean matters pertaining to the settlement of the estates of deceased persons. The administration of testamentary trusts has no more relation to the settlement of the estates of deceased persons than the foreclosure of mortgages ? ?."

The settlement of the matter in controversy here became a condition precedent to a final settlement of the estate of the deceased, Charles T. Pigdon. While this question was left open, it counsel for the defendants is correct in his contention that the Probate Court had no jurisdiction to determine the matter, the administratrix of the estate could not have procured her final account for approval without first assuming the responsibility of determining the rights of rival claimants to a distributive share of said estate.

In Shepherd v. Clark, 38 Ill. App. 6, it appears that a testator by his will provided that his estate should be divided into nine equal parts, one part to be paid to each of his living children, etc. The heirs of the testator were said under the direction of the County Court. One Millie Clark filed her petition in that court alleging that one of the said children had sold to her all of his interest in the land of the decedent, and she prayed in the petition for a share of the proceeds of the sale of the lands.

The County Court dismissed her petition without prejudice; she appealed to the Circuit Court, which held that she was entitled to the distributive share she sought by her petition. From the judgment of the Circuit Court an appeal was taken to the Appellate Court. In affirming the judgment of the Circuit Court the Appellate Court said:

> "Just what matters are embraced in the general terms 'probate matters,' 'settlements of estates of deceased persons' and 'adjustment of accounts of executors and administrators,' it may be difficult to determine; but in any view that can be reasonably or plausibly taken, it would seem that to the tribunal clothed with jurisdiction of them, some equitable power must appertain. By the estate of a deceased person is meant the property of all kinds belonging to such person at the time of his death. To 'settle' it, would seem to involve its ascertainment, discovery, collection and disposition to those legally or equitably entitled. * * * The persons entitled may be designated by will of the deceased, or ascertained by the law, upon other facts duly shown. The right, once vested in persons so ascertained, may pass to others before the estate is settled, by their death, or marriage, or insolvency, or contract - events and transactions never contemplated by the deceased - and it may be purely equitable. * * * It is conceded that some of these questions are within the jurisdiction of the County Court. * * But it is insisted that * * appellee was neither an heir, a legatee, nor a creditor of the estate; * * that the trial of the right as between her and Amos W. Kellar is not involved in the settlement of the estate; * * and that the County Court could not entertain jurisdiction of such a controversy. * * But if it further appeared that the interest of any such had passed by operation of law, or by their own undisputed and lawful act, we see no impropriety or usurpation in its finding the fact and ordering payment to the person really entitled."

It is insisted by counsel for the plaintiff that the above case cannot be considered in point for the reason that the opinion of the Appellate Court indicates that the "assignor was present by his attorney and did not dispute the fact, nor make any objection to the order she asked," and that it appears from the language of the court that the case presented a question of an undisputed assignment by a legatee. An examination of this authority will disclose that it was claimed in the Appellate Court that the County Court had no

The County Court dismissed her petition without prejudice; she appealed to the Circuit Court, which held that she was entitled to the distributive share she sought by her petition. From the judgment of the Circuit Court an appeal was taken to the Appellate Court. In affirming the judgment of the Circuit Court the Appellate Court said:

> "Just what matters are embraced in the general terms 'probate matters,' 'settlement of estates of deceased persons' and 'adjustment of accounts of executors and administrators,' it may be difficult to determine; but in any view that can be reasonably or plausibly taken, it could scarcely that to the tribunal clothed with jurisdiction of them, some equitable power must appertain. By the death of a deceased person as regards the property of all kinds belonging to such person at the time of his death. To 'settle' it, would seem to involve its ascertainment, discovery, collection and disposition to some legally or equitably entitled. * * * The persons entitled may be designated by will of the deceased, or ascertained by the law, upon their being duly shown. The right, once vested in persons to ascertained, may pass to others before the estate is settled, by their death, or marriage, or insolvency, or contract - events and transactions never contemplated by the deceased - and it may be purely equitable. * * * It is concedes that some of these questions are within the jurisdiction of the County Court. * * But it is insisted that * * specific sum as debt or a legacy, or a creditor of the estate; * * the trial of this right is between not some * * is not involved in the settlement of the estate; * * but that the county court could not exercise jurisdiction in such a case * * * very. * * Not if it further appeared that the interest of any such and passed by operation of law, or by their own undisputed and lawful act, we see no impropriety or usurpation in its finding the fact and awarding payment to the person rightly entitled."

It is insisted by counsel for appellee that the above case cannot be considered in point for the reason that the opinion of the Appellate Court therein cites the "assignor was present by his attorney and in no manner disputed the fact, nor made any objection to the order entered," and that it appears from the language of the court that the case presented a question of an undisputed assignment by a creditor. An examination of this authority will indicate that it was claimed in the Appellate Court that the County Court had no

jurisdiction of the matter in controversy. This question was directly presented to the Appellate Court, and as we view the matter it is not material whether the assignment was or was not disputed in the County court. Jurisdiction of the subject matter cannot be given to a court by consent of the parties; if the County Court did not have jurisdiction of the matter in question in the Shephard v. Clark case, supra, then it could not have adjudicated the right of the petitioner to the property or fund which she claimed.

Bennett v. Bennett, 168 Ill. App. 658, is a case involving a somewhat complicated set of facts, but not different in principle from those in the instant case. In its opinion the court said:

> "The fund in question was in the hands of the administrator, subject to the order of the Probate Court; all parties in interest were present. The Probate Court thus had jurisdiction of both the subject-matter and the parties. It would seem that upon reason and principle, such court, possessing as it did, full equitable powers in the administration of estates of deceased persons, had jurisdiction to adjust the equitable rights of the parties to such fund."

It should be noted that we do not say that the Probate Court had as a matter of independent original jurisdiction the power to determine the right of the plaintiff to the fund in question, it being our view that this jurisdiction attaches as an equitable power necessarily incident to the power of the court to settle the estate of the decedent. "It has been repeatedly held that the Probate court may exercise equitable jurisdiction in the settlement of estates - not its full jurisdiction, but such as is adapted to its organization and the mode of proceeding in that tribunal. * * * Indeed, the right of the Probate court to exercise equitable jurisdiction in the settlement of estates, when necessary to further the ends of justice, has been recognized and sustained

jurisdiction of the matter in controversy. This question was directly presented to the Appellate Court, and as we view the matter it is not material whether the assignment was or was not disputed in the County court. Jurisdiction of the subject matter cannot be given to a court by consent of the parties; if the County Court did not have jurisdiction of the matter in question in the Shepherd v. Clark case, supra, then it could not have adjudicated the right of the petitioner to the property or fund which she claimed.

Bennett v. Bennett, 182 Ill. App. 638, is a case involving a somewhat complicated set of facts, but not different in principle from those in the instant case. In its opinion the court said:

> "The fund in question was in the hands of the administrator, subject to the order of the Probate Court; all parties in interest were present. The Probate Court thus had jurisdiction of both the subject-matter and the parties. It would seem that upon reason and principle, such court, possessing as it did, full equitable powers in the administration of estates of deceased persons, had jurisdiction to adjust the equitable rights of the parties to such fund."

It should be noted that we do not say that the Probate Court had as a matter of independent original jurisdiction the power to determine the right of the plaintiff to the fund in question, in saying our view that this jurisdiction attaches as an ancillary power necessarily incident to the power of the court to settle the estate of the decedent. "It has been repeatedly held that the Probate court may exercise equitable jurisdiction in the settlement of estates - not its full jurisdiction, but such as is needed to the orderly administration and the mode of procedure in that tribunal. * * * Indeed, the right of the Probate court to exercise equitable jurisdiction in the settlement of estates, when necessary to further the ends of justice, has been recognized and sustained

in many cases." Shepard v. Speer, 140 Ill. 238.

Counsel for plaintiff have called our attention to and have quoted from the decisions of courts of other states. Certain of these decisions seem to support the contention made by counsel, but the holdings of the courts of review of this state leave but small doubt as to the power of the Probate Court to adjudicate upon a matter such as in involved in the case at bar. It is shown by the record that there was filed in the Probate Court a copy of the assignment to plaintiff, and it is insisted that this was notice to the defendants of the rights and interests of plaintiff in the distributive share of the assignor, Jay A. Rigdon, in the estate of Charles W. Rigdon, deceased; but, assuming this to be as alleged, it cannot therefrom be said that this notice imposed upon the administratrix the obligation of determining the validity of the claim of the plaintiff. The plaintiff must be presumed to have known that the Probate Court had ample jurisdiction to determine her right to the property in question, and her failure to petition that court, or to seek relief in any other court of competent jurisdiction, before the final settlement of the deceased's estate, must be held as a bar to her right of action in this suit.

We are of opinion that the Probate Court, as incidental to its jurisdiction to settle and distribute the assets of the decedent, Charles W. Rigdon, had the power to determine the rights and interests of the plaintiff in and to a distributive share of the estate of said deceased, and that the order of that court directing distribution to Jay A. Rigdon of the share of the estate claimed by the plaintiff, and the approval by the Probate Court of the final account filed by Anna M. Rigdon as administratrix of the estate of Charles

in many cases." Ehrenzeig v. Sperr, 140 III. 258.

Counsel for plaintiff have called our attention to and have quoted from the decisions of courts of other states. Certain of these decisions seem to support the contention made by counsel, but the holdings of the courts of review of this state leave but small doubt as to the power of the Probate Court to adjudicate upon a matter such as is involved in the case at bar. It is shown by the record that there was filed in the Probate Court a copy of the assignment to plaintiff, and it is insisted that this was notice to the defendants of the rights and interests of plaintiff in the distributive share of the assignor, Joy A. Higdon, in the estate of Charles W. Higdon, deceased; but, assuming this to be as alleged, it cannot therefore be said that this notice imposed upon the administratrix the obligation of determining the validity of the claim of the plaintiff. The plaintiff must be presumed to have known that the Probate Court had ample jurisdiction to determine her right to the property in question, and her failure to petition that court, or to seek relief in any other court of competent jurisdiction, before the final settlement of the deceased's estate, must be held as a bar to her right of action in this suit.

We are of opinion that the Probate Court, as indicated, to its jurisdiction to settle and distribute the assets of the decedent, Charles W. Higdon, had the power to determine the rights and interests of the plaintiff in and to a distributive share of the estate of said deceased, and that the order of that court directing distribution to Joy A. Higdon of the share of the estate claimed by the plaintiff, and the approval by the Probate Court of the final account filed by Anna M. Higdon as administratrix of the estate of Charles

W. Rigdon, deceased, are a bar to the right of action of the plaintiff.

Counsel for defendants has presented other questions for our consideration, but in view of the foregoing we do not deem it necessary to pass upon them.

The judgment of the Superior Court is affirmed.

AFFIRMED.

W. Higdon, deceased, are a bar to the right of action of the plaintiff.

Counsel for defendants has presented other questions for our consideration, but in view of the foregoing we do not deem it necessary to pass upon them.

The judgment of the Superior Court is affirmed.

AFFIRMED.

347 - 32681

THE OLD COLONY TRUST AND SAVINGS BANK, a corporation,
Appellant,

vs.

LOUISE HIRTSEL,
Appellee.

Appeal from Municipal Court of Chicago.

204 I.A. 311

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an action in the Municipal Court, brought by the plaintiff against the defendant to recover the sum of $531.80, upon a written guarantee of payment upon a promissory note. In an affidavit of merits filed by the defendant she alleged, as a defense to the action, that she was not liable as guarantor on the note in question for the reason that the said note had been fully paid.

Trial was had before the court without a jury. Plaintiff introduced the note in evidence. The defendant was sworn as a witness in her own behalf, and after the conclusion of her testimony on direct, her cross-examination by counsel for the plaintiff was begun, and after it had continued for some time, in answer to a question by counsel for plaintiff the witness answered, "I don't know that." The colloquy following then took place between counsel for plaintiff and the court:

THE COURT: "She says she does not know. What is the use of wasting time?"

MR. PETERSON: "I ask for a non-suit in this case."

THE COURT: "Judgment will be in favor of the defendant."

MR. PETERSON: "I object to it if the court please."

It is insisted by counsel for the plaintiff that the refusal of the court to enter an order of non-suit in the cause

was such error as compels a reversal of the judgment.

Section 30 of the Municipal Court Act provides as follows:

> "Every person desirous of suffering a non-suit on trial shall be barred therefrom unless he do so before the jury retire from the bar, or before the court, in case the trial is by the court without a jury, states its finding."

The trial judge in the case at bar, so far as the record shows, entered judgment in favor of the defendant before counsel for the plaintiff had concluded his cross-examination of the defendant; the plaintiff was not permitted to introduce any evidence in rebuttal of the testimony of defendant, had it chosen to offer such evidence, and the trial court had not announced its findings at the time counsel for plaintiff made his motion for a non-suit. This motion should have been allowed by the court. On the facts disclosed by the record in this case the trial court had no discretion in the matter of the order requested by plaintiff; plaintiff was entitled to the entry of the order of non-suit as a matter of law. Daube v. Kuppenheimer, 195 Ill. App. 89; Springer v. The Campbell Co., 174 Ill. App. 278.

The judgment of the Municipal Court is reversed and the cause is remanded to that court with directions to enter the order in the cause as requested by plaintiff.

REVERSED AND REMANDED
WITH DIRECTIONS.

was such error as compelled a reversal of the judgment.

Section 40 of the Municipal Court Act, provides as follows:

> "Every person charged with violating a municipal ordinance shall, upon his first appearance in court, be informed of the charge against him, and if he demands a jury, receive from the court, after the jury shall have been sworn, a copy of the complaint against him, and the trial is by the court without jury, shall be tried immediately."

The trial judge in the case [illegible] the defendant [illegible] reason there, unless [illegible] in favor of [illegible] force demanded for the plaintiff [illegible] of [illegible] action of the defendant, [illegible] interpose any evidence in behalf [illegible] are, [illegible] counsel [illegible] plaintiff [illegible] have been filed by the [illegible] the [illegible] the [illegible] the [illegible] as [illegible] of law. [illegible]

The [illegible]

[illegible]

[illegible]

249 - 22683

ILLINOIS SMELTING & REFINING COMPANY, a corporation, Appellant,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
CYCLONE FENCE COMPANY, Appellee.	

204 I.A. 312

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court to recover the sum of $331.96, which it claims is the balance due on a sale and delivery to defendant of 11,675 pounds of sheet zinc at 6-7/8 cents per pound. By way of recoupment defendant pleaded that the plaintiff agreed to sell it 40,000 pounds of sheet zinc; that plaintiff delivered only 11,675 pounds, and that it, defendant, was compelled to purchase the balance in open market at an increase of 1-1/8 cents per pound; and also that defendant was forced to pay $2.80 and $10.50 for returning certain antimonial lead which plaintiff had shipped to defendant without its knowledge or consent; that $470.70, which plaintiff says was paid on account, was in fact paid on an accord and satisfaction.

After hearing all of the evidence relating to the claim of plaintiff and the defense of defendant in support of the allegations in its plea above referred to, the court permitted defendant to file an amended affidavit of merits setting up that there had been an accord and satisfaction of the matters in dispute between the parties. The case was tried without a jury, and the finding and judgment were in favor of the defendant. The plaintiff brings the case here by appeal for review.

249 - 32665

ILLINOIS SMELTING & REFINING COMPANY, a corporation, Appellant,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
CYCLONE FENCE COMPANY, Appellee.	

204 I.A. 312

MR. JUSTICE DAVIS DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court to recover the sum of $331.96, which it claims is the balance due on a sale and delivery to defendant of 11,675 pounds of sheet zinc at 6-7/8 cents per pound. By way of recoupment defendant pleaded that the plaintiff agreed to sell it 40,000 pounds of sheet zinc; that plaintiff delivered only 11,675 pounds, and then it, defendant, was compelled to purchase the balance in open market at an increase of 1-1/8 cents per pound; and also that defendant was forced to pay $3.60 and $10.50 for returning certain antiquated load which plaintiff had shipped to defendant without its knowledge or consent; that $470.70, which plaintiff says was paid on account, was in fact paid on an account and satisfaction.

After hearing all of the evidence relating to the claim of plaintiff and the defense of defendant in support of the allegations in its plea above referred to, the court permitted defendant to file an amended affidavit of merits setting up that there had been an account and satisfaction of the matters in dispute between the parties. The case was tried without a jury, and the finding and judgment were in favor of the defendant. The plaintiff brings the case here by appeal for review.

It was orally stipulated upon the trial that the issues were whether the defendant had received less goods than it had ordered and which the plaintiff had agreed to deliver to it, and whether the $470.70 was paid on account or was in accord and satisfaction of matters in controversy. As to the first of these issues the evidence submitted by plaintiff and defendant, respectively, is in direct conflict. Witnesses testified as to the terms of the contract, and there was evidence heard from which the trial judge, who had an opportunity to hear and observe the witnesses, was authorized to find that the plaintiff agreed to deliver the 40,000 pounds of material, as alleged by the defendant.

It is evident that the trial court was convinced that the plaintiff must be held to have entered into an accord and satisfaction of the matter in dispute, and this brings us to a consideration of what seems to be the principal question in the case.

The contract involved was entered into on the 28th day of January, 1915. On February 24th, 1915, the defendant wrote the plaintiff as follows:

> "We are enclosing herewith our check for $470.70 in payment of 11,675# of Zinc Sheet which you shipped us on our order of 40,000# which you took at 6-7/8¢ per pound.
>
> "We have deducted $318.66 amount of loss we sustained on account of your not filling order as agreed, there being an increase in the price of zinc of 1-1/8¢ per pound between the time you took the order and the time we learned you would not fill the order as taken; we are also deducting $2.80 for unloading and loading Antimonial Lead which we did not order and could not use, also freight charges of $10.50 on shipment.
>
> "We are enclosing statement covering the transaction, and believe you will find check correct."

It appears that before this letter was written the defendant, on February 8th and again on February 11th, had demanded in writing of the plaintiff that it comply with the terms of the contract for the delivery of 40,000 pounds of zinc sheets. It stated in the letter of February 8th, "We

It was orally stipulated upon the trial that the issues were whether the defendant had received less goods than it had ordered and which the plaintiff had agreed to deliver to it, and whether the $470.70 was paid on account or was in accord and satisfaction of matters in controversy. As to the first of those issues the evidence submitted by plaintiff and defendant, respectively, is in direct conflict. Witnesses testified as to the terms of the contract, and there was evidence heard from which the trial judge, who had an opportunity to hear and observe the witnesses, was authorized to find that the plaintiff agreed to deliver the 40,000 pounds of material, as alleged by the defendant.

It is evident that the trial court was convinced that the plaintiff must be held to have entered into an accord and satisfaction of the matter in dispute, and this brings us to a consideration of what seems to be the principal question in the case.

The contract involved was entered into on the 28th day of January, 1918. On February 26th, 1918, the defendant wrote the plaintiff as follows:

> "We are enclosing herewith our check for $470.70 in payment of 11,97½% of nine sheet which you shipped us on our order of 40,000# which you took at 6-7/8¢ per pound.
> "We have deducted $218.65 amount of loss we sustained on account of your not filling order as agreed, there being an increase in the price of nine of 1-1/8¢ per pound between the time you took the order and the time we learned you would not fill the order as taken; we are also deducting $2.50 for unloading and loading automobiles which we did not order and could not use, also freight charges of $10.50 on shipment.
> "We are enclosing statement covering the transaction, and believe you will find check correct."

It appears that before this letter was written the defendant, on February 8th and again on February 11th, had demanded in writing of the plaintiff that it comply with the terms of the contract for the delivery of 40,000 pounds of zinc sheets. It stated in the letter of February 8th, "We

stand by our original order and will expect you to fill it just as we have gave it to you." The February 11th letter stated, "We will expect a reply by return mail stating whether or not you will deliver the balance of the zinc sheets at the price agreed upon in our telephone conversation and confirmed by our order to you * * . Failing to get the balance of these zinc sheets or failing to hear from you by return mail, we shall buy zinc in the market and expect you to make up the difference between the contract price of 6-7/8¢ delivered, and the than market price of zinc." In these letters the defendant also referred to the unauthorized shipment to it of the antimonial lead heretofore mentioned.

On February 10th plaintiff wrote the defendant, but did not in any direct manner meet the complaint of the defendant as to plaintiff's failure to deliver the material contracted for. A part of this letter is as follows:

> "We have in stock 300 to 400 plates of spelter made out of scrap sheet zinc. If you are in urgent need of same we can deliver you same at 8¢ per pound delivered Waukegan, Illinois. You will please notice that we are not selling you a full car but simply what we have on hand 10 to 15 tons. This can be loaded immediately upon receipt of your order providing we hear from you not later than tomorrow."

On February 12th the plaintiff wrote the defendant again as follows:

> "We are today in receipt of a letter signed J.H. Broad and as the writer is an old man in his line, and Mr. Broad's statement, as to 'charging our account' is certainly not becoming even for your trying it, and in the future, if there is any correspondence coming from your concern, please let it be direct from yourself, and if there should be so much dissatisfaction you had better return us the antimonial lead, get a car and load it up and send it back to us. Now, Mr. Arthur, when I was over to your place of business last, I understood we covered the ground thoroughly."

We are inclined to the view that the trial court was correct in its finding that the acceptance by the plaintiff of the $470.70 which was mailed to it by defendant on

stand by our original order and will expect you to fill it just as we have gave it to you." The February 11th letter stated, "We will expect a reply by return mail stating whether or not you will deliver the balance of the zinc sheets at the price agreed upon in our telephone conversation and confirmed by our order to you * * . Failing to get the balance of these zinc sheets or failing to hear from you by return mail, we shall buy zinc in the market and expect you to make up the difference between the contract price of 6-7/32¢ delivered, and the then market price of zinc." In these letters the defendant also referred to the unauthorized shipment to it of the aluminum load heretofore mentioned.

On February 10th plaintiff wrote the defendant, but did not in any direct manner meet the complaint of the defendant as to plaintiff's failure to deliver the material contracted for. A part of this letter it is follows:

> "We have in stock 300 to 400 plates of heater made out of scrap sheet zinc. If you are in urgent need of same we can deliver you such at 8¢ per pound delivered Chicago, Illinois. You will please notice that we are not selling you a full one but simply that we have on hand 10 to 15 tons. This can be loaded immediately a re-order of your order providing we hear from you not later than tomorrow."

On February 14th the plaintiff wrote the defendant again as follows:

> "We are today in receipt of a letter signed J. . Broad and as the writer is an old .an in this line, and Mr. Broad's statement, as to 'charging our accounts' is certainly not becoming, even for your trying it. Not in the future, if there is any correspondence coming from your concern, please let it be direct from yourself, and if there should be so much dissatisfaction you had best return the aluminum load, put a - and load it up and send it back to us. Now, Mr. Porter, what I want over to your piece of aluminum load, I understand we covered the ground thoroughly."

We are inclined to the view that the trial court was correct in its finding that the acceptance by the plaintiff of the $470.70 which was mailed to it by defendant on

February 24, 1915, accompanied by the letter of that date which specifically informed the plaintiff that the $470.70 was in full settlement of any sum due the plaintiff from defendant.

In its contention that no accord and satisfaction was had between the parties, plaintiff relies solely upon the case of Teague v. John E. Burns Lumber Co., 187 Ill. App. 225. In that case it was held that where there is a bona fide dispute between a debtor and creditor as to a portion of a claim made by the creditor, and the debtor sends to the creditor payment of the sum he admits to be due, with the express or implied condition that it is to be accepted as payment in full or returned, there is an accord and satisfaction if the creditor retains it, and the creditor cannot thereafter recover the balance he claims to be due. The decision of the above case does not, in our opinion, aid the contention of counsel for plaintiff, for the reason that on this record it is apparent that there was an actual dispute between the parties as to the terms of the contract which they had entered into, and as to whether the defendant had been damaged by the alleged failure of theplaintiff to perform its part of the contract. It is shown by the evidence in the record that the defendant accepted an offer on the part of the plaintiff to sell it the materiab in question, on the express understanding that plaintiff was to deliver to def ndant 40,000 pounds of such material. Plaintiff in fact delivered to defendant only 11,675 pounds of this material, and thereafter attempted to collect the contract price for the amount so delivered. A real dispute then arose between the parties as to the terms of the contract. As seen, the letter of February 24, 1915, above quoted, was delivered to plaintiff with an accompanying check, which check plaintiff received and appropriated to

February 11, 1918, accompanied by the letter of the 1st date which specifically informed the plaintiff that the $170.00 was in full settlement of any sum due the plaintiff from defendant.

In its contention that no accord and satisfaction was had between the parties, plaintiff relies solely upon the case of Teague v. John H. Burns Lumber Co., 187 Ill. App. 225. In that case it was held that there is a long line dispute between a debtor and creditor as to a portion of a claim made by the creditor, and the debtor sends to the creditor payment of the sum he admits to be due, with the express or implied condition that it is to be accepted as payment in full or returned, there is no accord and satisfaction if the creditor retains it, and the creditor cannot thereafter recover the balance he claims to be due. The application of the above rule does not, in our opinion, aid the contention of counsel for plaintiff, for the reason that on this record it is apparent that there was an actual dispute between the parties as to the terms of the contract which they had entered into, and as to whether the defendant had been damaged by the alleged failure of the plaintiff to perform the terms of the contract. It is shown by the evidence in the record that the defendant accepted an offer on the part of the plaintiff to sell it the material in question, on the express understanding that plaintiff would deliver to defendant, on demand, such material. Plaintiff did not deliver to defendant only 11,875 pounds of this material, and the defendant refused to collect the contract price for the amount so delivered. A real dispute then arose between the parties as to the terms of the contract. As seen, the letter of February 11, 1918, above quoted, was delivered to plaintiff with an accompanying check, which check plaintiff received and appropriated to

its own use. Under the decisions of this state it must be held that such conduct on the part of plaintiff operated as an accord and satisfaction of its claims against the defendant. Lapp v. Smith, 183 Ill. 179; Canton Union Coal Co. v. Parlin & Orendorff Co., 215 Ill. 244. "If the debt or claim is disputed or contingent at the time of payment, the payment, when accepted, of a part of the whole debt, is a good satisfaction." 1 Am. & Engl. Ency. Law, 2nd ed., 419.

The correspondence between the parties, shown by the record, when examined, is indicative of the desire and willingness of the defendant to comply with its part of the agreement, and we are of opinion that the defendant was justified in deducting the amount of the loss it sustained by reason of the failure of the plaintiff to perform its part of the contract.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

its own use. Under the decisions of this state it must be held that such conduct on the part of plaintiff operated as an accord and satisfaction of its claims against the defendant. Lamp v. Smith, 185 Ill. 179; Canton Union Coal Co. v. Franklin Creamery Co., 218 Ill. 244. "If the debt or claim is disputed or contingent at the time of payment, the payment, when accepted, of a part of the whole debt, is a good satisfaction." 1 Am. & Engl. Ency. Law, 2nd ed., 912.

The correspondence between the parties, shown by the record, when examined, is indicative of the desire and willingness of the defendant to comply with its part of the agreement, and we are of opinion that the defendant was justified in deducting the amount of the loss it sustained by reason of the failure of the plaintiff to perform its part of the contract.

The judgment of the municipal court is affirmed.

AFFIRMED.

252 - 22686

JOSEPH ELIA,
Appellant,

vs.

FRANK BAVUSO and
VINCENZO GUGLIELMO,
Appellees.

APPEAL FROM COUNTY COURT,
COOK COUNTY.

204 I.A. 314

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an action at law in the County Court, brought by plaintiff against the defendants upon a contractor's building bond. Plaintiff and the defendant Frank Bavuso entered into a contract for the construction of a building by Bavuso for plaintiff. Bavuso under the contract was to furnish all materials and to complete the building in accordance with certain plans and specifications. The contract provided that in case Bavuso failed to complete the building on or before September 2, 1912, he was to forfeit two dollars per day for the period of time taken to complete the building after that date. The contract also provided that in the event of any dispute arising during the course of the work the matter in dispute was to be referred to a board of arbitrators to be appointed as provided for in the contract. In an amended declaration filed by plaintiff it was alleged that the defendant as principal, and Vincenzo Guglielmo as surety executed and delivered to the plaintiff a bond which secured a proper performance of the contract in question.

Plaintiff alleged in his declaration that the defendant had failed to comply with the substantial requirements of the contract. The defendant filed to the declaration the plea of nil debit, and also three additional pleas as fol-

lows: (1) that no arbitrators were appointed and that no award was made, and that the matters in controversy were not submitted to the architects in accordance with the terms of the contract; (2) that no indebtedness was due plaintiff but that the plaintiff was indebted to the defendant Bavuso in the sum of $1,000 for the work done upon and the material furnished in the building; and (3) that the contract was so modified after the bond was given by defendant as to render such bond void. A demurrer was filed by plaintiff to all the pleas except the plea of nil debit; the demurrer was overruled as to the first and third additional pleas, and it was sustained as to the second additional plea. The defendant later filed a plea of set-off. Trial was had before a jury, which rendered a verdict in favor of Bavuso on his plea of set-off for the sum of $150. Judgment was entered on the verdict, and the plaintiff brings the case to this court by appeal.

Complaint is made of the action of the trial court in refusing to give certain instructions to the jury. We are unable to determine from the abstract of record filed by counsel for plaintiff whether, under the evidence heard at the trial, the instructions referred to were properly refused or not. The bill of exceptions, which has been made a part of the record, is not abstracted, and the abstract does not show what evidence was heard on the trial. One of these instructions recites in part, "that if you believe from the evidence that Bavuso did not well and truly perform and fulfill all the covenants and agreements * * and did not comply with the plans and specifications, then you must find the issues for plaintiff," etc. We have no means of knowing what the evidence was in this connection; hence we cannot say whether the instruction was or was not properly refused.

It is also urged that the court erred in over-

[illegible]

ruling the demurrer to the plea which alleged that the parties had not submitted the cause of action to arbitration as provided in the contract. Plaintiff did not stand by his demurrer; he elected to reply to the plea of no arbitration, and we cannot, therefore, insist here that this action of the court was error.

It is also urged that in an action of debt there can be no such thing as a judgment in favor of one defendant on a recoupment or set-off where there are more than one defendant. There is no merit in this contention. In Marcy v. Whallon, 115 Ill. App. 435, it was held that a surety may interpose by way of defense to an action against him a demand due from the plaintiff to the principal defendant in the action. "While it is a general rule that in order that a set-off may be applied there must be mutual and connected demands between the same parties and in the same right, yet suits against principal and surety furnish an exception to the rule." It was held in Himrod v. Baugh, 85 Ill. 435, that in a suit against a principal and his sureties the defendants may plead as a set-off a demand due from the plaintiff to the principal defendant.

The judgment of the County Court is affirmed.

AFFIRMED.

256 - 22690

OVERLAND MOTOR COMPANY, a corporation, Appellee, vs. W. C. FOSTER, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

204 I.A. 315

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

In an affidavit of claim filed in the Municipal Court the plaintiff alleged that the defendant was indebted to it in the sum of $14,61 for goods, wares and merchandise sold and delivered to the defendant and also for labor done and performed by plaintiff for the defendant at his special instance and request. The defendant was served with summons, and on the return day thereof a judgment was entered against him for the above named amount. On the following day, May 4, 1916, a motion was made by defendant to vacate this judgment; on May 5th the motion was allowed. The cause was set for trial on May 8th, on which date the defendant moved the court for a continuance, which motion was overruled and a finding and judgment entered against the defendant in the sum of $14.61.

Counsel for defendant insist that the trial judge committed error in overruling the motion for continuance of the cause; that the affidavit which was filed in support of the motion showed that counsel for defendant was on May 8th actually engaged in the trial of a cause in another court, and that under the rules of the Municipal Court the defendant was entitled as a matter of right to a continuance of the case.

If it be assumed that counsel for defendant are right in their contention, no advantage may be taken by the defendant

OVERLAND MOTOR COMPANY,
a corporation,
Appellee,

vs.

W. C. POSTER,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

OPINION

MR. JUSTICE MAYER DELIVERED THE OPINION OF THE COURT.

In an affidavit of claim filed in the Municipal Court the plaintiff alleged that the defendant was indebted to it in the sum of $124.61 for goods, wares and merchandise sold and delivered to the defendant and also for labor done and performed by plaintiff for the defendant at his special instance and request. The defendant was served with summons, and on the return day thereof a judgment was entered against him for the above named amount. On the following day, May 4, 1910, a motion was made by defendant to vacate this judgment; on May 5th the motion was allowed. The cause was set for trial on May 8th, on which date the defendant moved the court for a continuance, which motion was overruled and a finding and judgment entered against the defendant in the sum of $124.61.

Counsel for defendant insist that the trial court committed error in overruling the motion for continuance of the cause; that the affidavit which was filed in support of the motion shows that counsel for defendant was on May 6th actually engaged in the trial of a cause in another court, and that under the rules of the Municipal Court the defendant was entitled as a matter of right to a continuance of the case.

It is to be assumed that counsel for defendant are right in their contention, no authorities may be taken by the defendant

of this error in this court, for the reason that neither the abstract of the record filed herein, nor the bill of exceptions which has been made part of the record, contains any proof of the existence of the rules upon which counsel rely. This court will not take judicial notice of the rules of the Municipal Court of Chicago. Sixby v. Chicago City Ry. Co., 260 Ill. 478.

It is also urged that the statement of claim filed by plaintiff did not state a cause of action. Questioned as it is for the first time in this court, we are of opinion that the statement of claim filed by plaintiff is sufficient to sustain the judgment of the trial court.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

of this error in this court, for the reason that neither the abstract of the record filed herein, nor the bill of exceptions which has been made part of the record, contains any proof of the existence of the rules upon which counsel rely. This court will not take judicial notice of the rules of the Municipal Court of Chicago. Sixby v. Chicago City Ry. Co., 260 Ill. 472.

It is also urged that the statement of claim filed by plaintiff did not state a cause of action. Questioned as it is for the first time in this court, we are of opinion that the statement of claim filed by plaintiff is sufficient to sustain the judgment of the trial court.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

277 - 22711

AUGUST BEHRNS, Admr. of the Estate of Edward Behrns, Decd., Appellee,	APPEAL FROM
vs.	SUPERIOR COURT,
ADOLPH W. ROTH, Appellant.	COOK COUNTY.

204 I.A. 328

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff, as administrator of the estate of Edward Behrns, deceased, brought suit in the Superior Court against the defendant, Adolph W. Roth, charging in the declaration, consisting of two counts, that the defendant was legally responsible for the death of plaintiff's intestate. The first count charges that the defendant on the 4th day of August, 1914, was the proprietor and manager of a natatorium, located at No. 1238 Milwaukee avenue, Chicago; that it was the duty of defendant to furnish competent help, safety appliances and employees to safeguard the lives of patrons of the natatorium; that the deceased, Edward Behrns, on said date had visited the natatorium and, after swimming and playing about there for an hour and a half, was drowned, by and in consequence of "the neglect, lack of safety appliances, carelessness and lack of diligence of the said defendant and the guards at said natatorium." The second count charges that the deceased met his death "by the wrongful act, neglect, lack of safety appliances and default of said defendant, his servants, employees," etc.

On the trial the jury returned a verdict in favor of the plaintiff for the sum of $500. Judgment was entered on this verdict, and the defendant brings the case here by appeal for

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On the trial the jury returned a verdict in favor of the plaintiff for the sum of $500. Judgment was entered on the verdict, and the defendant brings the case here by appeal for

a reversal of this judgment.

Two main reasons are urged by the defendant why the judgment of the trial court should be reversed: first, that there was no evidence introduced or admitted on the trial from which it may reasonably be determined that the death of plaintiff's intestate was caused by drowning; second, that whatever may be said as to the cause of such death, there is no evidence in this record from which it may fairly be concluded that the death of plaintiff's intestate was the result of any negligence on the part of the defendant or his employees.

It appears from the evidence taken at the trial that the deceased, at the time he met his death, was 15 years and 11 months old; that on the day in question he and a boy companion visited the natatorium of the defendant; that he spent about an hour before his death swimming and playing about in the tank with some 35 other boys. The defendant had two guards at the tank at the time in question, one of whom was about 17 years of age, and the other was a mature man. The tank was 120 feet long and 30 feet wide, and "the water runs in depth from 2½ feet to 10 feet on the slope." The water was heated by steam and was filtered befor passing into the tank for use. An iron railing extended around the tank, about 3½ or 4 feet high; the sides of the tank were of white enameled cement. The depth of the water at various places in the tank was indicated by signs, and other signs contained warnings and cautions to persons using the tank, such as "Safety First," and "Look Before You Dive." Ropes extended across the tank, from which were suspended other ropes situated about a foot or a foot and a half apart, and extending downward towards the surface of the water in the tank. These ropes were for the use

a reversal of this judgment.

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of" customers who are exhausted, to hold to or to climb part way up and bob up and down and amuse themselves."

The deceased was last seen alive holding on to one of these ropes; he was seen to release his hold of the rope and sink in the tank. One of the boys watching him noticed that he came up again to the surface of the water but did not seem to "break the water"; he then disappeared again. The boy who had been watching deceased immediately informed the guard that "his friend went down and did not come up." This boy pointed out the place where deceased had sunk in the water, and the guard dived into the water and found deceased and brought him out of the tank. This guard had been in the employ of defendant for six years and was a licensed life saver. Deceased was placed upon the floor near the tank and the guard used his best efforts to resuscitate him; he placed his hands on deceased's stomach and pressed up, deceased lying face downward. The guard testified that a few drops of water may have issued from the mouth of deceased. Within five or six minutes after deceased had been taken from the tank a pulmotor arrived, as also a doctor, and every reasonable effort was made to restore him to life.

The evidence is clear that at the time deceased let go of his hold on the rope he made no outcry or struggle of any sort. There is some evidence to the effect that the guard had a newspaper in his hand at the time his attention was called to deceased. He testified that he had the newspaper folded up and was using it "slapping flies." Another witness, however, testified that the guard was reading the newspaper at the time deceased sank in the water. There was much noise in the natatorium at the time in question; the boys were jumping and diving in the water, and it was difficult to hear anything that might be said by any[illegible] at the time.

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One witness testified that there was some froth around the mouth and nose of the deceased after his body had been taken from the water, and another witness testified that a small quantity of water came from his mouth as the men were working upon him to restore him.

Frank Bona, who went to the natatorium with deceased, testified: "We were swimming in the shallow water for a while, then he swam across the tank across the shallow water. Then after a while he went in the ten-foot water and dived by the pipes near the spring-board. Then he said, 'let's try to go across the ropes once.' He went about two times, and said, 'it is some work.' After he got up he was trying to go a third time and was hanging on the ropes. Then he let go and I thought he was fooling, so I didn't say anything because I thought we would not get our swim if I told a lie to the life-saver. He came up once and came up for the second time, and I went to a boy, a man, and I told him and he didn't say anything. I told some boys, I told Speik, but they were swimming in the shallow water, so me and another boy, I don't know, ran to get someone. He ran up to the life-saver, and I found a life-saver sitting on the railing reading a newspaper. He had white pants on. It was right by the spring-bpard near the end of the tank. I said there was a boy drowning. He dived once and didn't get him, and the second time he dived he got him up. They laid him on his belly and started rubbing his back. * * He didn't cry out or make any noise."

There was introduced in evidence the verdict of the coroner's jury, which recited that deceased's death was caused by drowning. Dr. Reinhardt, coroner's physician, testifying on behalf of defendant, said that he made a post mortem on the body of Edward Behrns about 18 or 20 hours after his death; that he found no external marks of violence or injury;

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There was introduced in evidence the verdict of the coroner's jury, which recited that deceased's death was caused by drowning. Dr. Heimbardt, coroner's physician, testifying on behalf of defendant, said that he made a post mortem on the body of Edward Behrns about 18 or 20 hours after his death; that he found no external marks of violence or injury;

that he opened up the body and found the presence of a thymus gland in the lower part of the neck or upper part of the chest, extending down and covering about two-thirds of the right side of the heart; that he found the bronchial glands enlarged and hardened, and that the lungs were inflated; that there was no water in the lungs, chest cavity or bronchial tubes; that there was no disease of the heart; that the spleen was enlarged to three times its normal size; that the mesentery glands, which normally could not be felt, were enlarged and hardened; that the glandular structures in the intestines and lymphatics were enlarged three or four times their normal size, and that there was no water in the stomach. The witness stated that the Thymus gland is a gland which is supposed to be of great importance early in life and disappears between the ages of two to ten or twelve years; that where it does not disappear it causes an intoxication of the blood, and frequently causes sudden death. He further testified that in the large majority of drowning cases the lungs contain water; that where there is water in the lungs that has been removed by manipulation or the use of a pulmotor the water leaves indications of having been there; that he found no such indications in the case of the deceased; that persons in the same physical condition described by the witness are liable to die suddenly when swimming in the water; that it is a common cause for sudden death, and that in many instances "these particular cases" are found dead in bed without any apparent shock or injury. The witness testified that in his opinion deceased's death was caused by what he denominated status lymphaticus or obstruction of the lymph flow.

Another doctor, testifying for the defendant, in answer to a hypothetical question stated that in his opinion the death was not caused by drowning.

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Another doctor, testifying for the defendant, in answer to a hypothetical question stated that in his opinion the death was not caused by drowning.

On an examination of all of the evidence in this record we are of the opinion that the judgment of the trial court should be reversed. Taken as a whole, the evidence does not tend to prove that the deceased came to his death by drowning. Apart from the verdict of the coroner's jury, the evidence is clear that death was brought about by causes other than drowning. There was no evidence admitted tending in any way to contradict the testimony of Dr. Reinhardt, and from this testimony it abundantly appears that the deceased was afflicted with serious organic disease at and for some time before the date of his death. No evidence was offered in contradiction of what either Dr. Reinhardt or Dr. Hall, defendant's other expert witness, had testified to, and if we accept their testimony as true, it necessarily follows that our conclusion must be that plaintiff's intestate did not die as a result of drowning.

However, it is our opinion that a recovery cannot be had in this case, whatever may be said as to the cause of death, for the reason that on the whole record it is not shown that the defendant or his servants or employees were in any way guilty of negligence which contributed to the death of plaintiff's intestate. One of the reasons urged by counsel for plaintiff why the defendant should be charged with negligence, is that there was much noise and shouting going on just before and at the time deceased met his death. We do not think there is any merit in this contention. Common experience would teach us that the presence of 35 boys swimming in a natatorium such as that operated by defendant would necessarily be accompanied by much confusion and noise, and we do not think that even if it be conceded that there was the confusion and noise complained of at the time of this occurrence, it could

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in any sense be charged to the negligence of the defendant.

It is also claimed that there was an insufficient number of guards employed by the defendant in his natatorium at the time in question. Deceased's boy friend who was with him in the tank had not become apprised of any serious accident to deceased until he had come to the surface of the water the second or third time. We do not think that under the circumstances attending the death of deceased the presence of more guards in or about the tank would have been of the slightest aid or protection to him.

It is also said that insufficient safety appliances and apparatus were furnished by defendant. The evidence does not disclose any defects or insufficiencies in the appliances used by the defendant, nor does it disclose what other appliances or devices could have been used by him that would have afforded a greater protection to persons using the natatorium. It is true that the ropes which extended downward and over the tank did not reach the surface of the water, but it is beyond question, under the circumstances shown in the evidence, that even if they had done so they would have afforded no aid to the deceased.

It cannot be said from the evidence that the guards who were present at the time in question were guilty of any act of negligence. There is some evidence to the effect that the guard who brought deceased's body out of the tank was reading a newspaper at the time his attention was called to the deceased, but the greater weight of the evidence is to the effect that he was carrying this paper in his hand about the tank, and that he was not reading it at and just before the time his attention was called to the deceased. Nor do we think there is any merit in the contention that the defendant was negligent in not using prompt efforts to resuscitate the deceased after his body had

in any sense be charged to the negligence of the defendant.

It is also claimed that there was an insufficient number of guards employed by the defendant in his establishment at the time in question. Deceased's boy friend who was with him in the tank had not become apprised of any serious accident to deceased until he had come to the surface of the water the second or third time. We do not think that under the circumstances attending the death of deceased the presence of more guards in or about the tank would have been of the slightest aid or protection to him.

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been taken from the tank. The evidence discloses that the guard worked promptly and energetically upon the body of the deceased; that within five or six minutes after the body had been taken from the tank a pulmotor was applied, but without effect.

In Larkin v. Saltair Beach Co., 3 L.R.A., N.S., it was held that the owner of a public bathing resort may be found to be negligent where he places no signs as to the depth of water, or marks to indicate danger, and keeps no one at hand to aid persons in danger, and takes no steps to aid a person actually in peril until too late to be of any avail.

In Decatur Amusement Park Co. v. Porter, 137 Ill. App. 448, 452, the court said: "Under the authorities we hold that it was the duty of appellant to make reasonable provision to guard against those accidents which common knowledge and experience teach are liable to befall those engaging in the sport which appellant had invited the public to participate in. Tested by this rule it must follow that while the first and fourth counts each stated a cause of action the second and third counts did not state a cause of action which would be good even after a verdict. Each of the last named counts is based solely upon the assumption that it is actionable negligence not to have an experienced or competent swimmer or diver at hand to render aid to those liable to become strangled, etc."

The verdict of the jury was for the sum of $500. This sum is so small as to be in no sense compensation for the loss sustained by plaintiff by reason of the death of deceased, and it indicates that the jury in returning such a verdict were not guided by any principle of law or justice properly applicable to the facts of the case. If the defendant, through negligent

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conduct, is liable for the death of this boy, then the amount fixed in the verdict of the jury as compensation for such death must be regarded as wholly inadequate. We are inclined, however, to the view that the verdict was the result of sympathy rather than a consequence of a fair and impartial consideration of the evidence and the law of the case.

The judgment of the Superior Court is reversed.

REVERSED.

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The judgment of the Superior Court is reversed.

REVERSED.

277 - 22711

FINDING OF FACT.

The court finds that neither the defendant, Adolph W. Roth, nor his employees or servants, were guilty of any act or acts of negligence which proximately contributed to the death of plaintiff's intestate, Edward Behrns, as charged in plaintiff's declaration.

277 - 22711

FINDING OF FACT.

The court finds that neither the defendant, Adolph W. Roth, nor his employees or servants, were guilty of any act or acts of negligence which proximately contributed to the death of plaintiff's intestate, Edward Behrns, as charged in plaintiff's declaration.

291 - 22725

CHARLES A. WAHRER et al., co-partners, trading as Wahrer Bros.,
Appellants,

vs.

CIECILIA MOLLOY,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

204 I.A. 329

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiffs from a judgment of the Municipal Court in favor of defendant. Plaintiff brought suit in replevin for the recovery of a diamond ring of the value of $250. The evidence taken at the trial tends to prove that the defendant purchased the ring in question from the plaintiff under a contract which provided for the conditional sale of the ring and the payment therefor in installments; also that the title and right to possession of the ring was to remain in plaintiffs until the final payment had been made in accordance with the terms of the contract.

The ring was not recovered under the replevin writ, and by leave of court a statement in trover was filed, to which the defendant pleaded the general issue. The case was tried by ~~tk~~ a jury which returned a verdict finding the defendant not guilty; judgment was entered on this verdict. No appearance has been entered here and no brief has been filed on behalf of the defendant.

It is urged by counsel for plaintiffs that the verdict of not guilty was against the weight of the evidence. We are inclined to agree with this contention. There was in reality but one disputed question of fact presented at the trial for determination by the jury, and that was as to the value of the ring which had been sold by plaintiffs to de-

291 - 82725

CHARLES A. WARNER et al., co-partners, trading as Warner Bros., Appellants, vs. CLINCHILLA MOLDOV, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

204 I.A. 329

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

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The ring was not recovered under the replevin writ, and by leave of court a statement in trover was filed, to which the defendant pleaded the general issue. The case was tried by the a jury which returned a verdict finding the defendant not guilty; judgment was entered on this verdict. No appearance has been entered here and no brief has been filed on behalf of the defendant.

It is urged by counsel for plaintiffs that the verdict of not guilty was against the weight of the evidence. We are inclined to agree with this contention. There was in reality but one disputed question of fact presented at the trial for determination by the jury, and that was as to the value of the ring which had been sold by plaintiffs to de-

fendant. Plaintiffs proved the contract with defendant and their title and right to the possession of the ring until it had been fully paid for. The purchase price of the ring was $250, and a properly qualified witness for plaintiffs testified that the market value of the ring at the time it was sold to defendant was $250. The evidence discloses that defendant had paid $50 on account of her contract with the plaintiffs, and she sought to prove at the trial that the ring was not worth the $250 which the evidence shows she agreed to pay for it. The only evidence submitted by defendant on the trial in support of her claim that the ~~rigx~~ ring was worth less than the contract price was her own testimony, which is as follows:

> "Q. Tell me what you said to him. A. I told him what the stone was worth and asked him to take something off, and that I was willing to pay, and he said the stone was worth $250.
>
> Q. What did you tell him it was worth? A I told him it was worth $165 to $175.
>
> Q? Did he ask you who tested it? A Yes, and I wouldn't tell him. ** I refused to make further payments because they wouldn't return my money and I didn't think the ring was worth $250."

This testimony was objected to and motion was made to strike it out. The court overruled the objection and denied the motion. We are inclined to believe that this was error. There was no evidence whatsoever offered or submitted tending to show that the defendant-witness was in any way qualified to testify on the subject of the value of the ring. The value of property such as the diamond ring in question is peculiarly a matter of expert knowledge, and the testimony of an unqualified and inexpert witness is not admissible to prove such value.

As the testimony above quoted seems to be practically all of the evidence upon which the defendant relied for

fendant. Plaintiffs proved the contract with defendant and their title and right to the possession of the ring until it had been fully paid for. The purchase price of the ring was $250, and a properly qualified witness for plaintiffs testified that the market value of the ring at the time it was sold to defendant was $250. The evidence discloses that defendant had paid $50 on account of her contract with the plaintiffs, and she sought to prove at the trial that the ring was not worth the $250 which the evidence shows she agreed to pay for it. The only evidence submitted by defendant on the trial in support of her claim that the ring was worth less than the contract price was her own testimony, which is as follows:

"Q. Tell me what you said to him. A. I told him what the stone was worth and asked him to take something off, and that I was willing to pay, and he said the stone was worth $250.

Q. What did you tell him it was worth? A. I told him it was worth $105 to $175.

Q. Did he ask you who asked it? A. Yes, and I wouldn't tell him. -- I refused to make further payments because they wouldn't return my money and I didn't think the ring was worth $250."

This testimony was objected to and motion was made to strike it out. The court overruled the objection and denied the motion. We are inclined to believe that this was error. There was no evidence whatsoever offered or submitted tending to show that the defendant-witness was in any way qualified to testify on the subject of the value of the ring. The value of property such as the diamond ring in question is peculiarly a matter of expert knowledge, and the testimony of an unqualified and inexpert witness is not admissible to prove such value.

As the testimony above quoted seems to be practically all of the evidence upon which the defendant relied for

a verdict and judgment in her favor, and as it is obvious that it was error to admit such testimony, the judgment of the Municipal Court must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

a verdict and judgment in her favor, and as it is obvious that it was error to admit such testimony, the judgment of the Municipal Court must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

417 - 21815.

204 I.A. 334

THE UNIVERSITY CLUB OF CHICAGO, a corporation,
Appellant,

vs.

EARL H. DEAKIN,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an action for rent under a written lease in which the club was the lessor and Deakin the lessee. The case has been in this court before and is reported in abstract form in 182 Ill. App. 484. It went from this court for further review to the Supreme Court, whose decision is to be found in 265 Ill. 257. For a statement of the case and the questions involved we refer to the reported cases supra.

The twelfth clause of the lease is the bone of contention. It reads, "Lessor hereby agrees during the term of this lease not to rent any other store in said University Club Building to any tenant making a specialty of the sale of Japanese or Chinese goods or pearls." This covenant the Supreme Court held was binding and in effect meant what it said. In violation of this covenant, defendant claims, plaintiff rented another store in its building to one Sandberg, a jeweler who made a specialty of the sale of pearls, etc. Whether he did so or not is a question of fact, which the Supreme Court sent to the trial court for determination. The court found against the plaintiff on this proposition.

If the evidence sustains the finding, then the

THE UNIVERSITY CLUB OF CHICAGO, a corporation,
Appellant,

vs.

EARL R. DRAKIN,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an action for rent under a written lease in which the club was the lessor and Drakin the lessee. The case has been in this court before and is reported in abstract form in 198 Ill. App. 484. It went from this court for further review to the Supreme Court, whose decision is to be found in 268 Ill. 287. For a statement of the case and the questions involved we refer to the reported cases supra.

The twelfth clause of the lease is the bone of contention. It reads, "Lessor hereby agrees during the term of this lease not to rent any other store in said University Club Building to any tenant making a specialty of the sale of Japanese or Chinese goods or pearls." This covenant the Supreme Court held was binding and in effect meant what it said. In violation of this covenant, defendant claims, plaintiff rented another store in the building to one Sandberg, a jeweler who made a specialty of the sale of pearls, etc. Whether he did so or not is a question of fact, which the Supreme Court sent to the trial court for determination. The court found against the plaintiff on this proposition.

If the evidence sustains the finding, then the

judgment is right. On this point the Supreme Court said:

> "The court was not asked to make any finding of fact, and there is nothing in the record to indicate that the judgment is based upon any finding of fact. Whether Sandberg had, in fact, made a specialty of the sale of pearls was one of the controverted questions in the case. One of the propositions submitted by defendant in error and held by the court, stated that the conduct of a general jewelry business was not 'making a specialty of the sale of pearls,' within the meaning of the words quoted as they were used in the twelfth clause of plaintiff in error's lease. This cannot be construed as a holding that Sandberg did not, in fact, in addition to his conduct of a general jewelry business, make a specialty of the sale of pearls."

We think the evidence affirmatively establishes the fact that Sandberg did, in the conduct of his general jewelry business, make a specialty of the sale of pearls. The Supreme Court in construing the twelfth clause of the lease said:

> "By the terms of its contract with plaintiff in error it agreed that no other portion of its premises should be leased to any one engaged in the prohibited line of business, and if it failed to prevent any subsequent tenant from engaging in the business of making a specialty of the sale of pearls, it did so at the risk of plaintiff in error terminating his lease and surrendering possession of the premises."

The leasing by plaintiff of a store in its building to Sandberg as a rival of defendant in the sale of pearls, was a breach of that covenant, which the court of last resort has held warranted defendant in abandoning possession of his store and surrendering the same to plaintiff and absolved him from the payment of further rent therefor.

As one of the cogent evidences of the fact that Sandberg was making a specialty of the sale of pearls, an advertisement not contradicted is introduced in evidence, which, after showing a cut of a pearl necklace, proceeds:

"A Pearl Necklace

WITH NO DUPLICATE IN EXISTENCE

judgment is right. On this point the Supreme Court said:

> "The court was not asked to make any finding of fact, and there is nothing in the record to indicate that the judgment is based upon any finding of fact. Whether Sandberg had, in fact, made a specialty of the sale of pearls was one of the controverted questions in the case. One of the propositions submitted by defendant in error and held by the court, stated that the conduct of a general jewelry business was not 'making a specialty of the sale of pearls,' within the meaning of the words quoted as they were used in the twelfth clause of plaintiff in error's lease. This cannot be construed as a holding that Sandberg did not, in fact, in addition to his conduct of a general jewelry business, make a specialty of the sale of pearls."

We think the evidence affirmatively establishes the fact that Sandberg did, in the conduct of his general jewelry business, make a specialty of the sale of pearls. The Supreme Court in construing the twelfth clause of the lease said:

> "By the terms of its contract with plaintiff in error it agreed that no other portion of the premises should be leased to any one engaged in the prohibited line of business, and if it failed to prevent any subsequent tenant from engaging in the business of making a specialty of the sale of pearls, it did so at the risk of plaintiff in error terminating his lease and surrendering possession of the premises."

The leasing by plaintiff of a store in its building to Sandberg as a rival of defendant in the sale of pearls, was a breach of that covenant, which the court of last resort has held warranted defendant in abandoning possession of his store and surrendering the same to plaintiff and absolved him from the payment of further rent therefor.

As one of the cogent evidences of the fact that Sandberg was making a specialty of the sale of pearls, an advertisement not contradicted is introduced in evidence, which, after showing a cut of a pearl necklace, proceeds:

"A Pearl Necklace

WITH NO DUPLICATE IN KNISTENOS

We carry none but the most refined creations of the jeweler's art-designs exclusive, many with no duplicates in this country.

Pearl Necklaces	$400 to $7,000
Pearl and Diamond Brooches	$ 5 to $ 200
18 K. Wedding Rings (Seamless latest)	$ 7 to $ 12
22 K. Wedding Rings (English styles)	$ 8 to $ 12
Sterling Silver Coffee & Tea Sets	$ 20 to $ 400
A Complete assortment of Mesh Bags	$5.50 to $ 50

Inspection invited. We will send goods for examination anywhere in the United States.

WM. K. SANDBERG & CO.,
Chicago.

Jewelers.

138 Michigan Ave.
University Club Building."

From this advertisement it is patent that Sandberg made a specialty of dealing in pearl necklaces and that from a monetary viewpoint the other articles dealt in by him were insignificant and of small moment.

That Sandberg sold pearl necklaces on consignment does not in our judgment affect the situation, for it was immaterial to Deakin in his pearl business whether Sandberg specialized in pearls by sales on consignment or by carrying an assortment of pearls in stock. Whichever method was pursued, the result was the same to Deakin. He had in Sandberg, in the club's building, a competitor and a rival in the sale of pearls. This was a condition which defendant anticipated might occur and sought to escape by the covenant in the twelfth clause of the lease.

We think that the trial court did not err in holding that defendant did not waive any right he may have had

We carry none but the most perfect creations of the jeweler's art-dazzling exclusive, many with no duplicates in this country.

Pearl Necklace	$600 to $7,000
Pearl and Diamond Brooches	$ 5 to $ 200
18 K. Wedding Rings (Seamless Lined)	$ 7 to $ 12
22 K. Wedding Rings (English style)	$ 6 to $ 12
Sterling Silver Coffee & Tea Sets	$ 20 to $ 400
A Complete Assortment of Mesh Bags	$5.00 to $ 50

Inspection Invited. We will send goods for examination anywhere in the United States.

WM. K. SAUNDERS & CO.,
Chicago.
Jewelers.

108 Michigan Ave.
University Club Building.

From this advertisement it is patent that Saunders made a specialty of selling to moral members and that from a monetary viewpoint the other co-lodgers dwelt in by him were insignificant and of small moment.

But Saunders as a moral reformer on certain grounds does not in our judgment stand in elevation, for it was insisted of Dennin in his moral business whether Saunders specialized in poetic by dodge on commandment or by exercising an assortment of poetic in one. Howsoever matter was pursued, the result was the same as Saunders. In the case Saunders, in the court's judgment, a competitor and a rival in the sale of jewelry. This was a constitutional colonist instituted which court and sought to enjoin the government in the twelfth clause of the Jews.

We think that the trial court did not err in holding that defendant did not make any right on any copy had

to object to Sandberg's competition by reason of his failure to vacate promptly, or in holding that it was not necessary for defendant to assign Sandberg's sale of pearls as the reason for vacating the premises. We think the Supreme Court has settled these questions against plaintiff's contention, and that defendant, because of the breach by plaintiff of the twelfth clause of the lease, had the right to rescind the contract as he did.

The judgment of the Municipal Court is in accord with the decision of the Supreme Court in this case on the law and its finding of fact being sustained by the proofs, its judgment is affirmed.

AFFIRMED.

to object to Sandberg's competition by reason of his failure to vacate promptly, or in holding that it was not necessary for defendant to assign Sandberg's sale of pearls as the reason for vacating the premises.

We think the Supreme Court has settled these questions against plaintiff's contention, and that defendant, because of the breach by plaintiff of the twelfth clause of the lease, had the right to rescind the contract as he did.

The judgment of the Municipal Court is in accord with the decision of the Supreme Court in this case on the law and its finding of fact being sustained by the proofs. Its judgment is affirmed.

AFFIRMED.

128 - 22551

FRANK C. DIXON,
Appellee,

vs.

SMITH-WALLACE SHOE
COMPANY, a corp.,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

204 I.A. 336

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of $3,000 entered upon the verdict of a jury in favor of plaintiff and against defendant, and defendant appeals.

The cause proceeded to trial on an amended declaration and the plea of the general issue. This declaration, in legal effect, purported to charge that defendant maliciously prosecuted to judgment a suit against plaintiff in the courts of the State of Missouri, with malicious abuse of process in that suit. The evidence developed that plaintiff was an employee of defendant as a salesman, that such relationship was severed, and that defendant claimed an indebtedness from plaintiff and, subsequently learning that he owned a farm in Missouri, commenced a suit in attachment against plaintiff and attached his farm; that such proceedings were subsequently had that judgment was rendered against plaintiff, and his farm sold on final process, and that thereby he lost the farm; that all of said proceedings were had without notice to or the knowledge of plaintiff. The Missouri suit is characterized in the declaration as wrongful, fraudulent and malicious, and as instituted without probable cause.

In the conclusion to which we have come it is not necessary to advert to the merits or demerits of the cause. That conclusion rests in the failure of plaintiff

FRANK C. DIXON, Appellee, vs. SMITH-WALLACE SHOE COMPANY, a corp., Appellant.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of $2,000 entered upon the verdict of a jury in favor of plaintiff and against defendant, and defendant appeals.

The cause proceeded to trial on an amended declaration and the plea of the general issue. This declaration, in legal effect, purported to charge that defendant maliciously prosecuted to judgment a suit against plaintiff in the courts of the State of Illinois, with malicious abuse of process in that suit. The evidence developed that plaintiff was an employee of defendant as a salesman, that such relationship was severed, and that defendant claimed an indebtedness from plaintiff, and, subsequently learning that he owned a farm in Missouri, commenced a suit in attachment against plaintiff and attached his farm; that such proceedings were subsequently had that judgment was rendered against plaintiff, and his farm sold on final process, and that thereby he lost the farm; that all of said proceedings were had without notice to or knowledge of plaintiff. The defendant sought to demonstrate in the declaration as wrongful, fraudulent and malicious, and as instituted without probable cause.

In the consideration to which the evidence gives rise it is not necessary to advert to the merits of the plaintiff's cause. That conclusion rests in the failure of plaintiff

to maintain by proof either count of his declaration. In the first place, he failed to prove by competent evidence the existence of the judgment or of the proceedings in the Missouri court. Neither did he make any proof by competent evidence of the laws of the State of Missouri governing or controlling such proceedings.

Defendant at the close of plaintiff's proofs made a motion in writing for an instructed verdict in its favor and tendered such an instruction in writing, with the request that the court give it to the jury. The request so to instruct the jury should have been granted.

The only evidence concerning the alleged judgment in the Missouri Court was that of plaintiff, where he testified that he discovered a judgment in favor of the Smith-Wallace Shoe Company against him for four hundred "or odd dollars" in July, 1910; that from the time he left until the time he discovered the judgment he did not receive any communication from the defendant stating that he owed them any money, nor any notice of the pendency of the suit. On cross-examination plaintiff stated that he saw the judgment shown on an abstract, but he did not remember whether the abstract showed the sale or not. Another witness testified that he knew through correspondence that defendant had in 1909 started an attachment suit in Missouri against the property of plaintiff, and that the property was afterwards sold. This testimony is insufficient to establish the fact of the attachment suit or the judgment.

Judgments of courts of record must, to be admissible in evidence, be proven in conformity to Chap. 51, Sec. 13, R. S., title "Evidence and Depositions," which is as follows:

to maintain by proof either count of his declaration. In the first place, he failed to prove by competent evidence the existence of the judgment or of the proceedings in the Missouri court. Neither did he make any proof by competent evidence of the laws of the State of Missouri governing or controlling such proceedings.

Defendant at the close of plaintiff's proofs made a motion in writing for an instructed verdict in its favor and tendered such an instruction in writing, with the request that the court give it to the jury. The request to instruct the jury should have been granted.

The only evidence concerning the alleged judgment in the Missouri Court was that of plaintiff, where he testified that he discovered a judgment in favor of the Smith-Wallace Shoe Company against him for four hundred "or odd dollars" in July, 1910; that from the time he left until the time he discovered the judgment he did not receive any communication from the defendant stating that he owed them any money, nor any notice of the pendency of the suit. On cross-examination plaintiff stated that he had the judgment shown on an abstract, but he did not know whether the abstract showed the date or not. Another witness testified that he knew through correspondence that defendant had in 1909 started an action against plaintiff in Missouri claiming the property of plaintiff, but that the property was not reached and. This testimony is insufficient to set aside the judgment of the defendant and of the jury.

Judgments of courts of record only, to be admissible in evidence, be proven in conformity to sing. 31, Sec. 18, R. S., title "Evidence and Witnesses", which is as follows:

"The papers, entries and records of courts may be proved by a copy thereof certified under the hand of the clerk of the court having the custody thereof, and the seal of the court, or by the judge of the court if there be no clerk."

When plaintiff closed his proofs there was no question of fact to be submitted to the jury. He had utterly failed to make the primary proof necessary to warrant a recovery.

As plaintiff failed to establish by proof any right of action under the averments of his declaration, the judgment of the Circuit Court is reversed and a judgment of nil capiat and for costs entered in this court.

REVERSED WITH JUDGMENT OF NIL CAPIAT AND FOR COSTS.

"The papers, entries and records of courts may be proved by a copy thereof certified under the hand of the clerk of the court having the custody thereof, and the seal of the court, or by the judge of the court if there be no clerk."

When plaintiff closed his proofs there was no question of fact to be submitted to the jury. He had utterly failed to make the primary proof necessary to warrant a recovery.

As plaintiff failed to establish by proof any right of action under the averments of his declaration, the judgment of the Circuit Court is reversed and a judgment of nil capiat and for costs entered in this court.

REVERSED WITH JUDGMENT OF NIL CAPIAT AND FOR COSTS.

250 - 22684

ABRAHAM SHARFF,
Appellee,

vs.

FERDINAND HERMAN,
Appellant.

APPEAL FROM THE SUPERIOR COURT
OF COOK COUNTY.

204 I.A. 337

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The abstract of appellant is subject to the same criticisms of infirmities arising from non-compliance with the rules of this court regarding such abstracts as were made in Giuseppe Elia v. Societa Mutuo Soccorso Di Piane Crati, general number 22599. The reasons assigned for affirmance in the Elia case are equally applicable here, and on the authority of the opinion of Mr. Presiding Justice McSurely filed in that case on January 22, 1917, and not yet reported, and the cases therein cited, the judgment of the Superior Court is affirmed.

Notwithstanding the fact that we are not called upon to review the record before us on this appeal, we have nevertheless examined it together with the briefs filed, and are of the opinion that the judgment of the Superior Court is warranted and supported by the evidence and that in the record there is no reversible error.

AFFIRMED.

SDO - 22684

ABRAHAM SHARPE, Appellee,	
vs.	APPEAL FROM THE SCHAYLER COURT OF COOK COUNTY.
BENJAMIN HERMAN, Appellant.	

204 I.A. 387

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT:

The abstract of appellant is subject to the same criticism of infirmities arising from non-compliance with the rules of this court regarding such abstracts as were made in Giuseppe Zilia v. Society Italo Americana Di Mutuo Soccorso, non-oral number 22880. The reasons assigned for affirmance in the Zilia case are equally applicable here, and in the authority of the opinion of Mr. Presiding Justice Scanlan filed in that case on January 24, 1917, and not yet reported, and the cases therein cited, the judgment of the Superior Court is affirmed.

Notwithstanding the fact that we are not called upon to review the record before us in this proceeding, we have nevertheless examined it together with the brief filed, and are of the opinion that the judgment of the superior court is warranted and supported by the pleadings and facts in the record where in no proper life occur.

AFFIRMED.

253 - 22687.

204 I.A. 338

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	)	ERROR TO CRIMINAL COURT OF COOK COUNTY.
vs.	)	
FRED C. FORSTER, Plaintiff in Error.	)	

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant was convicted in a trial by jury in the Criminal Court of a conspiracy with one John Edison to cheat and defraud the National Lead Company out of the sum of $506.08, and was sentenced to a two year term of imprisonment in the penitentiary and to suffer a fine of $1000. From this conviction defendant seeks this review and argues for a reversal.

The original indictment consisted of six counts, the first three being what is commonly called conspiracy counts, the remaining three counts charging the obtaining of money by false pretenses by the practice of a confidence game. The conviction was on the conspiracy counts.

Much of defendant's argument falls flat because it is based on false premises. The State nolle prossed as to the three false pretense counts of the indictment, but by misprision of the clerk, the order was entered of record as to the conspiracy counts. When the State discovered the error the learned judge who presided at the trial on the motion of the State, entered a nunc pro tunc order which operated as a corrective to the misprision of the clerk, so that the record is before us on the conspiracy counts only.

323 - 22027.

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	ERROR TO CRIMINAL COURT OF COOK COUNTY.
vs.	
FRED C. FORSTER, Plaintiff in Error.	

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant was convicted in a trial by jury in the Criminal Court of a conspiracy with one John Edison to cheat and defraud the National Lead Company out of the sum of $506.08, and was sentenced to a two year term of imprisonment in the penitentiary and to suffer a fine of $1,000. From this conviction defendant seeks this review and urges for a reversal.

The original indictment consisted of six counts, the first three being what is commonly called conspiracy counts, the remaining three counts charging the obtaining of money by false pretenses by the practice of a confidence game. The conviction was on the conspiracy counts.

Much of defendant's argument falls flat because it is based on false premises. The State nolle prossed as to the three false pretense counts of the indictment, but by misprision of the clerk, the order was entered of record as to the conspiracy counts. When the State discovered the error the learned judge who presided at the trial on the motion of the State, entered a nunc pro tunc order which operated as a corrective to the misprision of the clerk, so that the record is before us on the conspiracy counts only.

The testimony of the State if accorded credence by the jury was sufficient in its probative force to sustain the conspiracy charged beyond all reasonable doubt; therefore, unless errors of procedure prejudicially affecting the rights of defendant can be found in the record, we are not warranted in disturbing the judgment.

Defendant was an employe of the National Lead Company in its Chicago works in the metal department. One of the duties of defendant was to receive metal for his employer and to "O. K. a slip showing the amount of metal received by him." On March 4, 1910, defendant's co-conspirator in the indictment presented to the Chicago cashier of the Lead Company a bill for $506.08, with a slip attached showing the metal, consisting of tin pipe, to have been received by defendant. In reliance upon the verities of defendant's certification of receipt of the metal, the cashier gave Edison the company's check on its Chicago bank account for the amount of $506.08, certified as due. This check was paid in due course. The tin pipe was never received, the certification by defendant was false, and as the result of the conspiracy between defendant and Edison the Lead Company was swindled out of the amount of its check to Edison. The conspiracy counts and every essential element thereof were abundantly proven by the competent evidence of credible witnesses. Corroborating such testimony is defendant's confession of the crime to the Lead Company's general superintendent at Chicago. The substance of this confession was that defendant had been stealing from the Lead Company; that he had approved bills in the name of Edison for which no

The testimony of the State if accepted as evidence by the jury was sufficient in its probative force to establish the conspiracy charged beyond all reasonable doubt; therefore, unless errors of procedure prejudicially affecting the rights of defendant can be found in the record, we are not warranted in disturbing the judgment.

Defendant was an employe of the National Lead Company in its Chicago works in the metal department. One of the duties of defendant was to receive metal for his employer and to "O. K." a slip showing the amount of metal received by him." On March 4, 1910, defendant's co-conspirator in the indictment presented to the Chicago cashier of the Lead Company a bill for $606.08, with a slip attached showing the metal, consisting of tin pipe, to have been received by defendant. In reliance upon the verities of defendant's certification of receipt of the metal, the cashier gave Ellison the company's check on the Chicago bank account for the amount of $606.08, certified as due. The check was paid in due course. The tin pipe was never received, the certification by defendant was false, and at the head of the conspiracy between defendant and Ellison the Lead Company was swindled out of the amount of its check to Ellison. The conspiracy continued over several months. Several thousand dollars were fraudulently obtained by the conspirators. Incredible witnesses. Incompetent testimony. Defendant's connection with the crime to the Lead Company's property alleged in the indictment at Chicago. No substantial conflict in the evidence was that defendant had been availing himself of the Lead Company; that he had approved bills in the name of Ellison for material no

goods had been received; that as an excuse for his peculations and frauds, defendant stated that he needed between $1500 and $2000 for renewals on some patents in which he was interested, and that from the $506.08 check he had received from Edison $200. While defendant denied making the confession, the jury were justified in disbelieving him, especially in face of the fact that the State had by credible witnesses proven the crime as charged by that quantum of proof which the law requires.

There was no improper evidence admitted on the part of the State nor was admissible evidence proffered by defendant rejected. The corpus delecti and the venue were sufficiently proven. This is not a close case on the evidence. Defendant, under the evidence, is guilty beyond all peradventure. No remark of the court or of the counsel for the State can, with the convincing evidence in view, be held in any way to have prejudiced defendant's case upon the question of his guilt. In a close case upon the facts our ruling might be different. The instructions to the jury challenged are not subject to any legal infirmity.

The conviction is right and the judgment of the Criminal Court is affirmed.

AFFIRMED.

goods had been received; that as an excuse for his possessions and frauds, defendant stated that he needed between $1500 and $2000 for renewals on some patents in which he was interested, and that from the $506.08 check he had received from Nelson $500. While defendant denied making the confession, the jury were justified in disbelieving him, especially in face of the fact that the State had by credible witnesses proven the crime as charged by that quantum of proof which the law requires.

There was no improper evidence admitted on the part of the State nor was admissible evidence proffered by defendant rejected. The corpus delecti and the venue were sufficiently proven. This is not a close case on the evidence. Defendant, under the evidence, is guilty beyond all peradventure. No remark of the court or of the counsel for the State can, with the convincing evidence in view, be held in any way to have prejudiced defendant's case upon the question of his guilt. In a close case upon the facts our ruling might be different. The instructions to the jury challenged are not subject to any legal infirmity.

The conviction is right and the judgment of the Criminal Court is affirmed.

AFFIRMED.

Additional opinion on Reh'g.

253 - 22687.

PEOPLE OF THE STATE OF ILLINOIS, Defendant in error, vs. FRED C. FORSTER, Plaintiff in error.	ERROR TO CRIMINAL COURT OF COOK COUNTY.

204 I.A. 338

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is a petition for a rehearing interposed in behalf of the plaintiff in error.

Since the decision of this cause and the handing down of the opinion therein, defendant has changed his counsel and the withdrawal of the old and the substitution of new counsel have been made matters of record.

Notwithstanding the petition for rehearing flagrantly violates Rule 25 of this court - which provides that "in no case will any argument be permitted in support of such petition," by rearguing in extenso with citation of numerous authorities the whole case, injecting into such argument matters and questions not touched upon in the original briefs of plaintiff in error - we have not thought fit to strike the petition from the cause, as we might, but have examined it in every particular. Whether our decision would have been different had the arguments now addressed to us been before us originally we do not deem it appropriate or necessary to decide. It is sufficient, however, to note that the matters discussed under point "I" in the petition are urged upon us in argument for the first time. This comes too late. New points and new arguments are of no avail in a petition for a rehearing. The remainder of the petition is an

PEOPLE OF THE STATE OF ILLINOIS, Defendant in error,	ERROR TO CRIMINAL COURT OF COOK COUNTY.
vs.	
FRED C. FORSTER, Plaintiff in error.	

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is a petition for a rehearing interposed in behalf of the plaintiff in error.

Since the decision of this cause and the handing down of the opinion therein, defendant has changed his counsel and the withdrawal of the old and the substitution of new counsel have been made matters of record.

Notwithstanding the petition for rehearing flagrantly violates Rule 25 of this court - which provides that "in no case will any argument be permitted in support of such petition," by resorting in extenso with citation of numerous authorities the whole case, injecting into such argument matters and questions not touched upon in the original brief of plaintiff in error - we have not thought fit to strike the petition from the cause, as we might, but have examined it in every particular. Whether our decision would have been different had the arguments now addressed to us been before us originally we do not deem it appropriate or necessary to decide. It is sufficient, however, to note that the matters discussed under cover of "1" in the petition are urged upon us in argument for the first time. This comes too late. Her points and new arguments are of no avail in a petition for a rehearing. The remainder of the petition is an

argument of points previously discussed.

The petition for a rehearing is denied.

REHEARING DENIED.

2.

argument of points previously discussed.

The petition for a rehearing is denied.

REHEARING DENIED.

257 - 22691

J. V. KINSMAN,
Appellee,

vs.

BRUNSWICK-BALKE-COLLENDER COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

204 I.A. 339

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of $87.25 entered upon the finding of the court under a submission of the cause to the court for trial. A collision between the automobiles of the parties is the gravamen of the action. Plaintiff was driving his own machine, while that of defendant was being driven by one of its employees.

The questions involved are all of fact. The testimony concerning the happening of the accident is in sharp conflict. If the evidence supporting the plaintiff's claim impressed the trial Judge, as it does us, as being a true narration of the events which led to the collision of the two automobiles, it follows that the evidence in defense was not sufficiently credited by the trial Judge to overcome the case made by plaintiff's evidence. We are not able to say that the conclusion of the trial Judge on the evidence found in the record was contrary to its probative force or manifest weight. This case is analogous to and is governed by the principles set forth in Gardner v. Ben Steele Weigher Manufacturing Co., 142 Ill. App. 348.

We are satisfied from the evidence in this record that the negligence of the servant of defendant set forth in the statement of claim was the cause of the collision which

257 - 22691

J. V. KINNAMAN, Appellee,	
vs.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
BRUNSWICK-BALKE-COLLENDER COMPANY, a corporation, Appellant.	

20 I.A. 339

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of $87.85 entered upon the finding of the court under a submission of the cause to the court for trial. A collision between the automobiles of the parties is the gravamen of the action. Plaintiff was driving his own machine, while that of defendant was being driven by one of its employees.

The questions involved are all of fact. The testimony concerning the happening of the accident is in sharp conflict. If the evidence supporting the plaintiff's claim impressed the trial judge, as it does us, as being a true narration of the events which led to the collision of the two automobiles, it follows that the evidence in defense was not sufficiently credited by the trial judge to overcome the case made by plaintiff's evidence. We are not able to say that the conclusion of the trial judge on the evidence found in the record was contrary to its probative force or manifest weight. This case is analogous to and is governed by the principles set forth in Gardner v. Ben Steele Leather Manufacturing Co., 142 Ill. App. 346.

We are satisfied from the evidence in this record that the negligence of the servant of defendant set forth in the statement of claim was the cause of the collision which

resulted in damaging the plaintiff's car to the amount awarded him by the trial Judge.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

resulted in damaging the plaintiff's car to the amount awarded him by the trial Judge.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

262 - 22696

PETER DAHLGREN,
Appellee,

vs.

LOUIS ISRAEL and
ISAAC ISRAEL,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

204 I.A. 340

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an action of the fourth class in the Municipal Court and is in tort. The trial was before the court and a jury. There were originally two other defendants, who were dismissed out of the case during the progress of the trial, the cause going to the jury against the two defendants, appellants here. The jury returned a verdict for $1,000, upon which, after the overruling of the usual motions for a new trial and in arrest of judgment, the judgment appealed from was entered.

The verdict is criticised as not being sustained by the evidence, and the court's refusal to instruct a verdict for defendants is assigned for error. The goods set forth in the statement of claim were stolen. Some of the witnesses had criminal records. The evidence was in sharp conflict. The determination of the credibility of the witnesses and the weight to be accorded their evidence was the task of the jury. The trial Judge, whose opportunities of seeing the witnesses and of determining such credibility and weight were equal to those of the jury, signified his concurrence with the conclusion reached by the jury by the entry of judgment thereon. In these circumstances we are not permitted to interfere with the finding of the jury and the judgment of the court unless we can say - which we cannot - that the verdict and

262 - 22696

PETER DAHLGREN, Appellee,	
vs.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
LOUIS ISRAEL and ISAAC ISRAEL, Appellants.	

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

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judgment are manifestly contrary to the probative force of the evidence. It is our judgment that the evidence supports the verdict.

The value of the goods stolen is set forth in the statement of claim as amended as $1485.66. Plaintiff, however, limited his right of recovery to $1,000, and waived the balance so as to bring his case within actions of the fourth class. Defendants insist that the court had no jurisdiction of the case in the fourth class division of the court because the actual value of the goods involved exceeds the jurisdictional amount of $1,000. To this insistance we are unable to agree. Plaintiff had a right to choose his forum and to minimize, for jurisdictional purposes, the amount of his claim if he saw fit to do so. Certainly defendants cannot be heard to complain of a procedure which was so much to their advantage. Errors must, to be reversible, be injurious in some way to the interest of the party assigning error. If no harm has resulted, a court of review will not reverse for mere matters of form which lack substance affecting substantial rights. This procedure finds support by analogy to the practice in vogue from time immemorial before justices of the peace, where claims exceeding the jurisdictional amount were entertained on <u>remittitur</u> to the jurisdictional sum. Furthermore, defendants made no such issue by their affidavit of meritorious defense. They are therefore debarred from raising the point on review for the first time. The claim of plaintiff was limited to $1,000 and the judgment is for that amount only. The proceeding, from inception to judgment, was for a claim within the jurisdiction of the court as a case of the fourth class.

Remarks of the court made in the presence of the jury are claimed to have been injurious to defendants. The

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Remarks of the court made in the presence of the jury are claimed to have been injurious to defendants. The

words objected to are: "The Criminal court is still located over on the North Side, and if I detect any perjury in the case the person who testifies falsely is going over to the North Side to answer for it." It will be noticed that these remarks were entirely impersonal, of a general character, and without reference to any particular witness. We are not prepared to say but that from the character of some of the witnesses, which appears from the testimony, the remarks were not only justified but were salutory, as a precautionary measure to suppress false testimony and to develop the truth. The language of the court cited cannot be construed as injurious to defendants' defense or as having influenced the verdict of the jury contrary to the merits of the cause. Eckels v. Halsten, 136 Ill. App. 111.

It is contended that plaintiff did not prove that he was a common carrier, that the goods were not sufficiently identified or their value proven by competent evidence. To these contentions we do not agree. The evidence in the record is sufficient to sustain the findings of the jury on these points against defendants.

The jury in their verdict as first rendered undertook, after assessing plaintiff's damages at $1,000, to apportion the amount each defendant should contribute toward the payment of the same, and although the jury had sealed their verdict and disbanded, the court on their reassembling again had the jury retire to reform their verdict, which they did by eliminating therefrom the apportionment of the amount of the verdict. It is said that the court had no power or authority for this action. If this contention were well taken it would be inoperative to avoid the effect of the verdict as rendered, because the verdict was complete and

words objected to are: "The criminal court is still located over on the North Side, and if I detect any perjury in the case the person who testifies falsely is going over to the North Side to answer for it." It will be noticed that these remarks were entirely impersonal, of a general character, and without reference to any particular witness. We are not prepared to say but that from the character of some of the witnesses, which appears from the testimony, the remarks were not only justified but were salutory, as a precautionary measure to suppress false testimony and to develop the truth. The language of the court cited cannot be construed as injurious to defendants' defense or as having influenced the verdict of the jury contrary to the merits of the cause. Mokeis v. Holsten, 136 Ill. App. 111.

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in due form to the point where the apportionment occurred, and the court might, on its own motion, have stricken that part from the verdict as surplusage, leaving the verdict in the form in which the jury ultimately returned it and in the form in which the court ordered it recorded. It is the recorded verdict which controls. Holcomb v. Linn, 174 Ill. App. 419. Moreover, the question regarding the correction, after sealing, of the verdict of the jury when it again convenes, is settled in this State. It was held in Nolan v. East, 132 ibid 634, that "the court did not err in reconvening the jury after they had returned their verdict to correct an obvious error therein * * although it was a sealed verdict, since signing which the jury had separated for the night." Rigg v. Cook, 4 Gilm. 352. A verdict may be changed by the jury before acceptance by the court and its being ordered to be recorded. Martin v. Morelock, 32 Ill. 485. The fact that the verdict was sealed and the jury had separated did not affect the situation.

The trial did justice between the parties and the judgment of the Municipal Court is affirmed.

AFFIRMED.

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The trial did justice between the parties and the judgment of the Municipal Court is affirmed.

AFFIRMED.

267 - 22701.

204 I.A. 342

JAMES GOGGIN,
Appellee,

vs.

MARGARET A. COLLINS,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Complainant filed his bill for a mechanic's lien against certain real estate improved with an apartment house of defendant, Margaret A. Collins, and secured a decree establishing the lien claimed for the sum of $800, with interest and costs. This decree was entered upon the report of a master to whom the cause had been referred.

Complainant made a written contract with Margaret A. Collins for the lathing and plastering of an eighteen apartment building for the sum of $4660. The contract provided that payment should be made upon certificates of the architect as the work progressed. The final certificate of the architect, it was agreed, should be conclusive on the parties. From time to time the architect issued certificates to complainant aggregating $4000, leaving unpaid on the contract price $660. Complainant also claims $202.90 for extra work.

The evidence demonstrates that the work of complainant was not satisfactory to the architect. On January 22, 1915, the architect wrote complainant a letter in which he said, "Sorry to state that your work is not satisfactory, that you have delayed the building beyond the

867 - 2270I.

JAMES COGGIN,
Appellee,

vs.

MARGARET A. COLLINS,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

20 I.A. 342

MR. JUSTICE MORGAN DELIVERED THE OPINION OF THE COURT.

Complainant filed his bill for a mechanic's lien against certain real estate improved with an apartment house of defendant, Margaret A. Collins, and received a decree establishing the lien claimed for the sum of $800, with interest and costs. This decree was entered upon the report of a master to whom the cause had been referred.

Complainant made a written contract with defendant A. Collins for the lathing and plastering of an eighteen apartment building for the sum of $1550. The contract provided that payment should be made upon certificates of the architect as the work progressed. The final certificate of the architect, it was agreed, should be conclusive on the parties. From time to time the architect issued certificates to complainant aggregating $900, leaving a balance on the contract price $650. Complainant claims $300.00 for extra work.

The evidence preponderates that the work of complainant was not satisfactory to the architect. On January 8th, 1912, the architect wrote complainant a letter in which he said, "Sorry to state that your work is not satisfactory, that you have delayed the building beyond the

renting season * *" and enclosed a debit account in which he charged the complainant with $1158.90, in which $500 was deducted for inferior work and $540, at $15 per day, for delay in doing and completing the work in accordance with the stipulation to that effect found in the contract. This was the last certificate, or document in the nature of a certificate, which the architect issued to complainant. The building was thereafter turned over to Collins and she settled with the architect for his services, from which time, it is contended, his duties as architect ceased.

It appears from the proofs that the so-called final certificate in evidence, the basis of complainant's bill, was procured by complainant from the architect after the final statement above referred to had been given to him by the architect and after the architect had completed his duties under the contract and his service had ended; that the architect told complainant that he was no longer acting as architect for Margaret A. Collins, but nevertheless complainant continued to call at his office and to annoy him with a demand for a certificate for the amount he claimed was his due, and that, as the architect testified, not because complainant was entitled to it but to get rid of him, he gave complainant the so-called final certificate now in dispute.

It is clear that complainant knew that his work was not satisfactory and that the architect was not satisfied with the manner in which he had performed his contract, and that the itemized account which the architect sent to complainant on January 22, 1915, informed him in detail of the architect's judgment and opinion as to the financial obligation between complainant and Mar-

renting season - " and enclosed a final account in which he charged the complainant with [illegible], on which [illegible] was deducted for inferior work and [illegible], at [illegible] per day, for delay in doing and completing the work in accordance with the stipulation to that effect found in the contract. This was the last certificate, [illegible] of a certificate, which the architect issued to complainant. The building was thereafter turned over to [illegible] and she settled with the [illegible] for all services, from which time, it is contended, the duties of architect ceased.

It appears from the [illegible], the so-called final certificate in evidence, the basis of complainant's bill, was procured by complainant [illegible] after the final statement above referred to [illegible] him by the architect and after the architect had completed his duties under the contract and his services had ended; that the architect told complainant that [illegible] acting as architect for [illegible], but neverthe-less complainant continued to [illegible] annoy him [illegible] he [illegible] tified, not because complainant [illegible] to get rid of him, he gave [illegible] final certificate [illegible].

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garet A. Collins. The statement and letter of January 22, 1915, were in effect, both in law and in fact, the final certificate of the architect to complainant, from which complainant knew that the architect found that instead of the owner being indebted to complainant on the contract, complainant was indebted to her several hundred dollars.

In view of these conditions, we hold that the architect had no authority or power to issue the certificate for $800 on which this action is based, and that as to Margaret A. Collins the issuing of said certificate was a fraud and not binding upon her. Monahan v. Fitzgerald, 164 Ill. 525.

As this action rests for its support upon the so-called architect's certificate for $800, which we hold was fraudulently issued, the complainant has no right to maintain the decree appealed from.

The decree of the Circuit Court is therefore reversed and the cause is remanded to the Circuit Court with directions to that court to enter a decree dismissing complainant's bill for want of equity.

REVERSED AND REMANDED
WITH DIRECTIONS.

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As this action rests for its support upon the so-called architect's certificate for $800, which we hold was fraudulently issued, the complainant has no right to maintain the decree appealed from.

The decree of the Circuit Court is therefore reversed and the cause is remanded to the Circuit Court with directions to that court to enter a decree dismissing complainant's bill for want of equity.

REVERSED AND REMANDED

WITH DIRECTIONS.

278 - 22712

ELIZABETH BAXTER,
Appellee,

vs.

ROTHSCHILD & COMPANY,
a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

204 I.A. 346

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of $2500 entered upon the verdict of a jury in an action for personal injury.

At the time plaintiff was injured she was in the building in which defendant was carrying on a commercial business. The building was not quite completed, the processes of construction not quite ended. The painting contractor, among others, was, in the performance of his painting contract, personally at work near the elevators in the northeast corner of the main floor at the time of the accident, and had laid a heavy canvass on the floor in front of some of the elevators to serve as a drop cloth. The evidence shows that plaintiff, a customer of appellant's store, descended from an upper floor to the first floor in an elevator furnished by defendant for that purpose, and stepped out from the elevator to the floor; that she tripped and fell upon an uneven, rough canvass in front of the elevator; that one of her feet caught in a fold or loop of the canvass, throwing her to the floor and injuring her as detailed in the evidence, lay and medical. It is charged that the negligence consisted in defendant's maintaining the canvass on the floor without fastening the same, so that it became wrinkled, folded and gathered in

278 - 22712

ELIZABETH BAXTER,
Appellee,

vs.

ROTHSCHILD & COMPANY,
a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

204 I.A. 346

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loops, and that while plaintiff was walking with due care for her own safety, her foot caught in a fold of the canvass, causing her to stumble and injuring her.

The principal defense made is that the place where the accident occurred was in the possession of independent contractors, and that defendant is not liable for the acts or omissions of the servants of an independent contractor. We do not think the independent contractor defense is available on the undisputed facts. Defendant was operating its business; it was in possession of the premises. The occupancy thereof by the contractor was only incident to the possession of defendant. The contractor was not in possession of the premises. His being there and doing work on the building did not constitute that kind of possession which obtains to an independent contractor and which releases the owner from liability for the acts of such contractor and his servants. The whole theory of non-liability rests in the possession being in the contractor to the exclusion of the owner. The situation in Glickauf v. Maurer, 75 Ill. 289, is analogous to the instant case. The court there said:

> "There was no such surrender of the entire possession of the premises to the workman as could relieve appellants of responsibility. The arrangement made amounts merely to this: appellants employed a mechanic to make certain repairs upon a building, a portion of which was occupied by appellee. In making the repairs the mechanic can only be regarded as the servant of appellants, and we see no reason why they should not be held responsible for the negligence of the mechanic in doing work."

So, in this case, the contractor was the servant of defendant. The negligence of the contractor is therefore imputable to defendant. The doctrine of independent contractor has no application to this case. Defendant being in possession of the building, operating its business, cannot shift the duty that it owed to its customers upon the painting contractor. It is the law that so long as defendant

loops, and that while plaintiff was walking with due care for her own safety, her foot caught in a fold of the canvas, causing her to stumble and injuring her.

The principal defense made is that the place where the accident occurred was in the possession of independent contractors, and that defendant is not liable for the acts or omissions of the servants of an independent contractor. We do not think the independent contractor defense is available on the undisputed facts. Defendant was operating its business; it was in possession of the premises. The occupancy thereof by the contractor was only incident to the possession of defendant. The contractor was not in possession of the premises. His being there and doing work on the building did not constitute that kind of possession which obtains to an independent contractor and which relieves the owner from liability for the acts of such contractor and his servants. The whole theory of non-liability rests in the possession being in the contractor to the exclusion of the owner. The situation in Pickhart v. Lawson, 76 Ill. App. 1, is analogous to the instant case. The court there said:

> "There was no such surrender of the entire possession of the premises to the workmen as could relieve appellants of responsibility. The arrangement made amounts merely to this: appellants employed workmen to make certain repairs upon a building, a portion of which was occupied by appellee. In making the repairs the mechanics can only be regarded as the servants of appellants, and we see no reason why they should not be held responsible for the negligence of the mechanics in doing work."

In this case, the contractor was the servant of defendant. The negligence of the contractor is therefore imputable to defendant. The doctrine of independent contractor has no application to this case. Defendant being in possession of the building, operating its business, cannot shift the duty that it owes to its customers upon the painting contractor. It is the law that so long as defendant

kept its place of business open and customers were invited and permitted to enter therein to trade, defendant owed the duty to its customers to keep its building in a reasonably safe condition so that no injury would happen to them while in the exercise of ordinary care.

There were other defendants originally in the case who were subsequently dismissed out of it. To these defendants, for the consideration of $625, plaintiff gave a covenant not to prosecute. Defendant contends that the settlement made was an accord and satisfaction, and that consequently all the parties were released, and that the doctrine that where one joint tort feasor is released, all are released, applies. We think this question was properly left to the jury and that they might properly find that the money received from the other defendants was an undertaking not to prosecute and was not received in settlement of the case.

After the jury retired to consider their verdict an instruction regarding the amount of the ad damnum was given by the court at the request of the jury. The amended declaration laid the ad damnum at $15,000 and the additional counts at $10,000. The court instructed the jury in writing that the lesser amount was the ad damnum in the case. Of this defendant complains and contends that it was reversible error to so instruct the jury after they had retired to consider their verdict. We can see no point to this contention, as defendant suffered no harm from the giving of such instruction.

The verdict was supported by the evidence; the instruction to direct a verdict, asked by defendant, was properly refused; there is no error in the court's ruling upon the instructions; the jury were warranted in finding

kept its place of business open and customers were invited and permitted to enter therein to trade, defendant owed the duty to its customers to keep its building in a reasonably safe condition so that no injury would happen to them while in the exercise of ordinary care.

There were other defendants originally in the case who were subsequently dismissed out of it. To these defendants, for the consideration of $625, plaintiff gave a covenant not to prosecute. Defendant contends that the settlement made was an accord and satisfaction, and that consequently all the parties were released, and that the doctrine that where one joint tort feasor is released, all are released, applies. We think this question was properly left to the jury and that they might properly find that the money received from the other defendants was an undertaking not to prosecute and was not received in settlement of the case.

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The verdict was supported by the evidence; the instruction to direct a verdict, asked by defendant, was properly refused; there is no error in the court's ruling upon the instructions; the jury were warranted in finding

that plaintiff was not guilty of any contributory negligence which was the proximate cause of her injuries. We are unable to say that the damages awarded are excessive for the injuries sustained.

There is no reversible error in this record and the judgment of the Circuit Court is affirmed.

AFFIRMED.

that plaintiff was not guilty of any contributory negligence which was the proximate cause of her injuries. We are unable to say that the damages awarded are excessive for the injuries sustained.

There is no reversible error in this record and the judgment of the Circuit Court is affirmed.

AFFIRMED.

282 - 22716

MARGARET HUDSON, Appellee,	)	
	)	APPEAL FROM MUNICIPAL COURT
vs.	)	OF CHICAGO.
MERCHANTS RESERVE LIFE INSURANCE COMPANY, Appellant.	)	

204 I.A. 348

MR JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

On a trial before the court and jury plaintiff had a verdict and judgment for $1667, and defendant appeals.

The foundation of the action is two policies of insurance for $1,000 each upon the life of John P. Hudson, in both of which the plaintiff, his wife, was the beneficiary. Proofs of death were made under each policy, and it is claimed that thereafter, on September 12, 1912, plaintiff signed on the back of each policy a receipt in full for $1,000; that on that date a check for $2,000 on the National Bank of the Republic was drawn by the defendant to the order of currency. It is contended that Hendricks, the president of defendant, cashed this check; that it was drawn as stated upon its face "In full settlement of Hudson claim, policies Nos. 1054, 1122," being the policies in suit; that Hendricks, after cashing this check, paid plaintiff $600; that this $600 payment was in full settlement of plaintiff's claim under both policies, and that such settlement was a compromise between the parties of plaintiff's claim, the defendant Company claiming a defense to both policies on the ground of false statements concerning the health and habits of the insured made in his application for insurance, and failure to commence suit within one year. On the other hand, plaintiff claims that

1921 - 22716

[illegible] HUNTER, Plaintiff, vs. [illegible] MOTOR [illegible] INSURANCE COMPANY, Appellant.	[illegible] Appeal from [illegible] County. [illegible] Affirmed.

IN DETECTIVE STORY INVOLVING THE DEATH OF AN [illegible].

In a trial before the court and jury [illegible] had a verdict and judgment for $[illegible], and defendant appeal[illegible].

The foundation of the action is an [illegible] of insurance for $1,000 upon the life of [illegible], in both of which the plaintiff, [illegible], was the beneficiary. Proofs of death were duly [illegible] and [illegible] on the ground that [illegible] on that date a close [illegible] republic was [illegible] It is contended [illegible] caused this death: [illegible] "in full [illegible] 1122," [illegible] opening this [illegible] ment see in full [illegible] policies, [illegible] the matter [illegible] claiming a [illegible] statements [illegible] made in his application [illegible] suit within one [illegible]

the $600 payment was simply on account and that Hendricks promised to pay the $1400 balance soon thereafter, saying, "You sign the receipt for the $600 and when the records are all gone through, and we can prove up things right, you will get the balance of the money."

Plaintiff gave a receipt for the $600, which is not in evidence. Hendricks, with whom the alleged settlement was made, did not testify. Defendant's defense resolves itself into one in the nature of an accord and satisfaction. The contentions regarding failure to commence a suit within the year provided for in the application for the policies and the falseness of the representations as to the health and habits of the insured made in the application, are not, in the condition of the record, material to be inquired into.

One Parker S. Webster was the attorney for plaintiff who represented her in this matter until the time of the alleged settlement for $600. Webster was present as the legal adviser of plaintiff at the time the $600 was paid. Plaintiff gave in evidence her understanding of the conversation and agreement with Hendricks at the time of her receipt of the $600 from him. Webster was a witness to the transaction and defendant put him on the witness stand and interrogated him as to what occurred at that time. Webster declined to answer the questions put to him on the ground that the communications were privileged, and plaintiff thereupon joined the witness in objection to his making answer to these questions, for the reasons stated by him. The court sustained plaintiff's objection and refused to permit Webster to answer the questions put to him concerning what transpired between his client and Hendricks at the time Hen-

the $600 payment was simply on account and that Hendricks promised to pay the $1400 balance soon thereafter, saying, "You sign the receipt for the $600 and when the records are all gone through, and we can prove up things right, you will get the balance of the money."

Plaintiff gave a receipt for the $600, which is not in evidence. Hendricks, with whom the alleged settlement was made, did not testify. Defendant's defense resolves itself into one in the nature of an accord and satisfaction. The contentions regarding failure to commence a suit within the year provided for in the application for the policies and the falseness of the representations as to the health and habits of the insured made in the application, are not, in the condition of the record, material to be inquired into.

One Parker C. Webster was the attorney for plaintiff who represented her in this matter until the time of the alleged settlement for $600. Webster was present as the legal adviser of plaintiff at the time the $600 was paid. Plaintiff gave in evidence her understanding of the conversation and agreement with Hendricks at the time of her receipt of the $600 from him. Webster was a witness to the transaction and defendant put him on the witness stand and interrogated him as to what occurred at that time. Webster declined to answer the questions put to him on the ground that the communications were privileged, and plaintiff upon joined the witness in objection to his giving answer to these questions, for the reasons stated by him. The court sustained plaintiff's objection and refused to permit Webster to answer the questions put to him concerning what transpired between his client and Hendricks at the time ter-

dricks paid plaintiff the $600.

It is clear, we think, that the communications referred to were not privileged; that they were not communications between attorney and client, but communications made to a third party by the client and attorney, and that they in no respect come under the ruling of professional communications which are privileged. We think a most excellent illustration applicable to the instant case is found in Thayer v. McEwen, 4 Ill. App. 416, in which the court said:

> "We are all of the opinion that this was error in the court below. It is the right of every one to freely communicate to his counsel any matter concerning his case, to the end that the counsel can properly prepare and present his client's cause to the court or jury, and all such communications are properly privileged, but we are aware of no case holding that an attorney is privileged from testifying to any agreement made with the opposite party at the request of his own client. Such a transaction does not come within the rule of privileged communications between attorneys and client. Since the claim of appellant as to the terms of the contract was disputed by the appellees, we can see that this action of the court might and probably did work serious injustice to the appellant."

Even had the communication been privileged, its character as such was waived by plaintiff testifying in relation thereto. In other words, plaintiff had given her version of the conversation and agreement with the president of defendant at the time of the alleged settlement. It was therefore the privilgge of defendant toccall, in contradiction of plaintiff, her attorney or any other witness to the conversation. The rule is well settled in People v. Gerold, 265 Ill. 448, thus:

> "While the general rule is that all confidential communications between attorney and client made because of their relationship and concerning the subject matter of the attorney's employment are privileged from disclosure, and counsel are not at liberty, even if they wish, to testify concerning them, (People v. Barker, 56 Ill. 299; Thorp v. Goewey, 85 id. 611; 1 Greenleaf on Evidence, (Lewis' ed.) sec. 237; State v. Douglass, 20 W. Va. 770; Spaulding v. State, 61 Neb. 289; State v. Snowden, 23 Utah, 318); yet the client himself can waive such privi-

dzioka paid plaintiff the $600.

It is clear, we think, that the communications referred to were not privileged; that they were not communications between attorney and client, but communications made to a third party by the client and attorney, and that they in no respect come under the ruling of professional communications which are privileged. We think a most excellent illustration applicable to the instant case is found in Thayer v. Bowen, 4 Ill. App. 416, in which the court said:

> "We are all of the opinion that this was proper in the court below. It is the right of every one to freely communicate to his counsel any matter concerning his case, to the end that the counsel can properly prepare and present his client's cause to the court or jury, and all such communications are properly privileged, but we are aware of no case holding that an attorney is privileged from testifying to any agreement made with the opposite party at the request of his own client. Such a transaction does not come within the rule of privileged communications between attorney and client. Under the claim of privilege as to the terms of the contract was disputed by the appellee, we can see no just ground of the court might and probably did work serious injustice to the appellee."

Even had the communication been privileged, its character as such was waived by plaintiff testifying, in violation thereto. In other words, plaintiff and Byron Carlson of the conversation and agreement with [illegible] of defendant at the time of the alleged settlement. [illegible] was therefore the privilege of defendant to call, in [illegible] tion of plaintiff, for matters of any such client [illegible] conversation. The rule is well [illegible] in [illegible] v. [illegible], 268 Ill. 446, thus:

> "While the general rule is that all confidential communications between attorney and client [illegible] their relationship and concerning the subject matter of the attorney's employment are privileged "as a [illegible] and counsel are not at liberty, even if they [illegible] tify concerning them, (Jones v. Barker, 65 [illegible]; Thorp v. Goewey, 25 Ia. 216; 1 Greenleaf on Evidence, (Lewis' ed.) sec. 237; Estes v. Hopkins, [illegible]; Spaulding v. Steele, 81 Mich. 289; Lucas v. Brooksbank, 23 Utah, 318); yet the client himself can waive such privi-

lege, and does so where he voluntarily testifies himself to confidential communications between himself and his attorney. Such waiver, however, extends no further than the subject matter concerning which testimony had been given by the client. 1 Thornton on Attorneys, secs. 92, 130, and cited cases: Knight v. People, 192 Ill. 170."

It is also contended that the court erred in refusing to permit defendant to explain the purpose of the receipts on the back of the policies. It is the settled law in this State that receipts may be explained orally. Starkweather v. Maginnis, 196 Ill. 274; Carr v. Miner, 42 ibid 179; Reading v. Traver, 83 ibid 372.

For the errors indicated the judgment is reversed and the cause remanded to the Municipal Court for a new trial.

REVERSED AND REMANDED.

lege, and does so where he voluntarily testifies himself to confidential communications between himself and his attorney. Such waiver, however, extends no further than the subject matter concerning which testimony had been given by the client. 1 Thornton on Attorneys, secs. 32, 130, and cited cases: Knight v. People, 139 Ill. 170."

It is also contended that the court erred in refusing to permit defendant to explain the purpose of the receipts on the book of the policies. It is the settled law in this State that receipts may be explained orally. Schwerdtner v. Ruginis, 190 Ill. 276; Carr v. Miner, 42 Ibid 175; Keeling v. Traver, 83 Ibid 372.

For the errors indicated the judgment is reversed and the cause remanded to the Municipal Court for a new trial.

REVERSED AND REMANDED.

289 - 22723

CHRISTIAN JOHNSON,
Appellee,

vs.

PAUL F. P. MUELLER,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

204 I.A. 349

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This cause has been twice tried before court and jury. The first trial resulted in a judgment for $3000 and the second, now before us, in a judgment for $2000 on a remittitur of $1,500 from the verdict. The facts and the law governing such facts are stated in the opinion of this court rendered on a review of the first judgment, which is reported in abstract form in 192 Ill. App. 422. This opinion is the law of this case except in so far as new elements are injected into the case upon the second trial. In the opinion supra this court said:

> "Plaintiff alleges that while engaged in wedging the shores which had already been placed in position under the boxes, by the defendant, a shore nearby, so placed in position by defendant, but through negligence not nailed to the box overhead, fell and struck plaintiff, inflicting injuries.
>
> Upon the trial no witness testified that the shore which fell and struck plaintiff was one which had been before that placed in position under a box. The most that can be said is that after plaintiff was struck a shore was found lying on the floor by him, which had no nail-holes in the upper cross-piece. Neither plaintiff nor his witnesses undertake to say where this shore was standing just before it fell. It does not appear that after the accident any shore was missing from those standing in position under the beam where plaintiff worked, or from any other place nearby. There was testimony tending to show that plaintiff himself, before placing shores in position, frequently leaned them against the upright columns, and that he had been warned of the danger of their falling from that position. One witness testifying for defendant said that the plank which struck plaintiff 'was uprights leaning against another upright.'

289 - 28725

CHRISTIAN HOKSEON, Appellee,	
vs.	APPEAL FROM MUNICIPAL COURT OF COOK COUNTY.
PAUL F. T. MUELLER, Appellant.	

2 CIA. 349

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This cause has been twice tried before court and jury. The first trial resulted in a judgment for $3000 and the second, now before us, in a judgment for $2000 on a remittitur of $1,000 from the verdict. The facts and the law governing such facts are stated in the opinion of this court rendered on a review of the first judgment, which is reported in abstract form in 181 Ill. App. 422. This opinion is the law of this case insofar as far as new elements are injected into the case upon the second trial. In the opinion supra this court said:

> 'Plaintiff alleges that while engaged in working the stone wall already been placed in position under the crane, by the defendant, a stone nearby, as placed in position by defendant, but through negligence not nailed to the box structure, fell and struck plaintiff, injuring plaintiff.
>
> Upon the trial he attempted testified that the stone which fell and struck plaintiff was one which had been placed in position under a box. The most that can be said is that after plaintiff was struck a stone was found lying on the floor by him, which had no nail-holes in the upper cross-piece. Neither plaintiff nor his witnesses undertook to say that this stone was standing just before it fell. It does not appear that after the accident any stone was missing from those standing in position under the box where the plaintiff worked, or from any other place nearby. There was testimony tending to show that plaintiff himself, before placing stones in position, frequently [illegible] against the upright columns, and that he had been warned of the danger of their falling from that position. One witness testifying for defendant said that the plank which struck plaintiff 'was upright leaning against another upright.'

> These considerations, with other details and circumstances in evidence unnecessary now to narrate, impel us to the opinion that justice will be better served by requiring a new trial, at which it may be possible to show with reasonable certainty from whence the shore or upright in question fell. Plaintiff is bound to prove the negligence alleged in his declaration, and the single fact that plaintiff was struck by the falling shore, is not sufficient."

The proof that was lacking in the first trial to sustain the verdict was amply supplied on the second, as appears from the record before us. We think the jury might well find from the evidence that the accident resulted from the negligence of defendant charged in the declaration, and that the accident and the resulting injury to plaintiff were caused through the negligence of defendant in failing to fulfill the legal requirement of furnishing plaintiff a safe place in which to work. The claim that the accident was caused either by plaintiff himself or his alleged fellow workman, Benson, placing loose planks against an iron column just previous to or at the time of the accident, was thoroughly overcome by the testimony of several witnesses, whom the jury were warranted in believing.

It would have been error for the court to have instructed a verdict for defendant, as requested by him, either at the close of plaintiff's proofs or at the conclusion of all the proofs.

There was no error in refusing to give instructions Nos. 22 and 23 proffered by defendant. No. 22 was disposed of in the prior opinion of this court, and No. 23 invaded the province of the jury to determine the fact as to who was a fellow servant of plaintiff. In the condition of the evidence the question as to who was a fellow servant with plaintiff was not one of law but of fact and not analogous to Meyer v. Illinois Central R. R. Co., 177 Ill. 591. The jury were suffi-

> These considerations, with other details and circumstances in evidence unnecessary now to narrate, impel us to the opinion that justice will be better served by requiring a new trial, at which it may be possible to show with reasonable certainty from whence the shore or upright in question fell. Plaintiff is bound to prove the negligence alleged in his declaration, and the single fact that plaintiff was struck by the falling shore, is not sufficient."

The proof that was lacking in the first trial to sustain the verdict was amply supplied on the second, as appears from the record before us. We think the jury might well find from the evidence that the accident resulted from the negligence of defendant charged in the declaration, and that the accident and the resulting injury to plaintiff were caused through the negligence of defendant in failing to fulfill the legal requirement of furnishing plaintiff a safe place in which to work. The claim that the accident was caused either by plaintiff himself or his alleged fellow workman, Cason, placing loose planks against an iron column just previous to or at the time of the accident, was thoroughly overcome by the testimony of several witnesses, whom the jury were warranted in believing.

It would have been error for the court to have instructed a verdict for defendant, as requested by him, either at the close of plaintiff's proofs or at the conclusion of all the proofs.

There was no error in refusing to give instructions Nos. 22 and 23 proffered by defendant. No. 22 was disapproved of in the prior opinion of this court, and no. 23 invaded the province of the jury to determine the fact as to who was a fellow servant of plaintiff. In the condition of the evidence the question as to who was a fellow servant with plaintiff was not one of law but of fact and not analogous to Sayer v. Illinois Central R. R. Co., 177 Ill. 591. The jury were suffi-

ciently and accurately instructed as to the law of the case and the theory of the defense.

Defendant attached a copy of the former decision of this court as an appendix to his brief. Unfortunately there are several misrecitations in it. One such misrecitation was important as well as misleading; the word "inapplicable" is rendered "applicable" and quite an argument is built up on this incorrect recitation. The sentence should read, "We do not understand the rule that the master must exercise reasonable care to furnish a reasonably safe place for his servant to work, to be inapplicable when conditions are changing from time to time during the work of constructing a building."

The judgment of the Superior Court being right is affirmed.

AFFIRMED.

clearly and accurately instructed as to the law of the case and the theory of the defense.

Defendant attached a copy of the former decision of this court as an appendix to his brief. Unfortunately there are several misrecitations in it. One such misrecitation was important as well as misleading; the word "inapplicable" is rendered "applicable" and quite an argument is built up on this incorrect recitation. The sentence should read, "We do not understand the rule that the master must exercise reasonable care to furnish a reasonably safe place for his servant to work, to be inapplicable when conditions are changing from time to time during the work of constructing a building."

The judgment of the Superior Court being right is affirmed.

APPIRMED.

15 - 21551

204 I.A. 352

I. MULLER,
Defendant in Error,

vs.

L. WALENSKY and H. RABINOVITZ,
Plaintiffs in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Defendant in error, the plaintiff below, brought a suit in the Municipal Court of Chicago upon two promissory notes against plaintiff in error as the makers thereof.

The striking of the last amended affidavit of merits, filed by leave of court, is assigned as error. It pleaded a total failure of consideration. It is difficult to understand why such a plea, permitted by the statute, was not allowed unless the court deemed the facts pleaded as insufficient in law to support such a plea. Without reciting the pleading at length it is sufficient to say that we think defendant was entitled (especially under the liberal form of pleading in that court) to make his defense upon the facts pleaded, which were in substance that the notes were given for work of a specific kind to be done that was never performed. The judgment will be reversed and the cause remanded so that defendant will have an opportunity to make his defense.

REVERSED AND REMANDED.

I. MULLER,
Defendant in Error,

vs.

I. WAXMANSKY and H. RABINOVITZ,
Plaintiffs in Error.

APPEAL TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MCGURN
DELIVERED THE OPINION OF THE COURT.

Defendant in error, the plaintiff below, brought a suit in the Municipal Court of Chicago upon two promissory notes against plaintiff in error on the maker thereof.

The pleading of the first amended affidavit of merits, filed by leave of court, is obnoxious to error. It pleaded a total failure of consideration. It is difficult to understand why such a plea, permitted by the statute, was not allowed unless the court deemed the facts pleaded as insufficient in law to support such a plea. Without rectifying the pleading at length it is not relevant to say that we think defendant was entitled (especially under the liberal form of pleading in the court) to raise his defense upon the facts pleaded, which were in substance that the notes were given for work or a specific line to be done that was never performed. The judgment will be reversed and the cause remanded so the defendant will have an opportunity to make his defense.

REVERSED AND REMANDED.

89 - 21965

S. S. BORDEN COMPANY,
Defendant in Error,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a corp.,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

204 I.A. 353

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The only question raised by this writ is as to the sufficiency of the statement of claim to support an ex parte judgment in tort rendered in a fourth class case of the Municipal Court of Chicago. It first alleges that the plaintiff (defendant in error) had purchased a car load of live poultry from Geo. M. Brooks & Co. of Milan, Tennessee, and had instructed them to ship the same to Pittsburgh, Pennsylvania. It then proceeds to state the main facts on which the plaintiff predicates its claim for damages, namely, (1) that plaintiff delivered to defendant a telegram addressed to said Brooks & Co., at Milan, Tennessee, saying: "Bill car poultry Grant street", (2) that the said defendant instead of transmitting the said telegram to Milan, Tennessee, transmitted same to Martin, Tennessee, (3) "and the said Geo. M. Brooks & Co. at Milan, Tennessee were instructed by the party receiving the telegram to ship said poultry to Grant street, Chicago", (4) and that the car was thereupon billed to Chicago and the plaintiff was compelled to have it forwarded from Chicago to Pittsburgh, causing damages complained of.

S. S. DORMAN COMPANY, Defendant in Error,	
vs.	ERROR TO MUNICIPAL COURT OF CHICAGO.
THE WESTERN UNION TELEGRAPH COMPANY, a corp., Plaintiff in Error.	

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The only question raised by this writ is as to the sufficiency of the statement of claim to support an ex parte judgment in tort rendered in a fourth class case of the Municipal Court of Chicago. It first alleges that the plaintiff (defendant in error) had purchased a car load of live poultry from Geo. M. Brooks & Co. of Milan, Tennessee, and had instructed them to ship the same to Pittsburgh, Pennsylvania. It then proceeds to state the main facts on which the plaintiff predicates its claim for damages, namely, (1) that plaintiff delivered to defendant a telegram addressed to said Brooks & Co., at Milan, Tennessee, saying: "Bill car poultry Grant street", (2) that the said defendant instead of transmitting the said telegram to Milan, Tennessee, transmitted same to Martin, Tennessee, (3) "and the said Geo. M. Brooks & Co. at Milan, Tennessee were instructed by the party receiving the telegram to ship said poultry to Grant street, Chicago", (4) and that the car was thereon billed to Chicago and the plaintiff was compelled to have it forwarded from Chicago to Pittsburgh, causing damages complained of.

The statement of claim contains no averments from which either the nature of the business of the defendant or a duty owing from it to plaintiff may be legitimately inferred. Even if we might assume from such allegations that the defendant company was engaged in the business of transmitting telegraph messages, etc., and was in duty bound to properly deliver said message to the addressee, still we cannot in violation of the fundamental rules of pleading supply necessary allegations as to other omitted matters without which the elements of a tort are not stated nor inferable.

The damages sought to be recovered resulted, according to the averment, from instructions given by "the party" receiving the telegram. The inference is that the message was delivered to a third party at Martin who undertook to interpret it. For aught stated to the contrary, he received the message in correct form, but conveyed it to some one required to act upon it incorrectly. Who this third party was is left to conjecture. He may have been addressee's own agent. From the language employed this inference is as reasonable as any other. If he was not defendant's agent then the proximate cause of the damages claimed was the intervening act of such third party and not the delivery by defendant of an incorrect message to the addressee. If plaintiff intended to aver delivery of an incorrect message to addressee then there was no difficulty in so alleging instead of employing an equivocal and uncertain averment that suggests that the real facts might not justify a direct charge of negligence on the part of defendant. As stated the facts do not support an inference of defendant's negligence.

The statement of claim contains no averments from which either the nature of the business of the defendant or a duty owing from it to plaintiff may be legitimately inferred. Even if we might assume from such allegations that the defendant company was engaged in the business of transmitting telegraph messages, etc., and was in duty bound to properly deliver said messages to the addressee, still we cannot in violation of the fundamental rules of pleading supply necessary allegations as to other omitted matters without which the elements of a tort are not stated nor inferable.

The damages sought to be recovered resulted, according to the averment, from instructions given by "the party" receiving the telegram. The inference is that the message was delivered to a third party at Berlin who undertook to interpret it. For aught stated to the contrary, he received the message in correct form, but conveyed it to some one required to act upon it incorrectly. In this third party was in fact to conjecture. We may have been addressee's own agent. Upon the language employed this inference is as reasonable as any other. If he was not defendant's agent then the proximate cause of the damage claimed was the intervening act of such third party and not the delivery by defendant of an incorrect message to the addressee. If plaintiff undertook to sue delivery of an incorrect message to addressee then there is no difficulty in the pleading instead of employing an exceptional and certain averment that suggests that the tort might not justify a direct charge of negligence on the part of defendant. As stated the facts do not show an inference of defendant's negligence.

Construing the statement of claim most strongly against the pleader, as is done under the general rule of pleading, which must apply as well to pleadings in the Municipal Court when the allegations are uncertain and capable of different interpretations, it reasonably supports the inference that the message was delivered in proper form but that some one other than defendant's agent was responsible for its misinterpretation.

Because the statement of claim fails to state the essential elements of a tort on the part of defendant, to say nothing about facts that raise a duty on its part to plaintiff, and to state a causal relation between defendant's delivery of the message and the damages claimed, the judgment cannot stand, (Gillman v. Chicago Railways Co., 268 Ill. 305) and the motion of defendant to vacate the judgment entered after default should have been allowed. The Emberg case, 271 Ill. 404, cited by defendant in error, does not undertake to overrule the Gillman case supra.

REVERSED AND REMANDED.

Construing the statement of claim most strongly against the pleader, as is done under the general rule of pleading, which must apply as well to pleadings in the municipal Court when the allegations are uncertain and capable of different interpretations, it reasonably supports the inference that the message was delivered in proper form but that some one other than defendant's agent was responsible for its misinterpretation.

Because the statement of claim fails to state the essential elements of a tort on the part of defendant, to say nothing about facts that raise a duty on its part to plaintiff, and to state a causal relation between defendant's delivery of the message and the damages claimed, the judgment cannot stand, (Gillman v. Chicago Railways Co., 268 Ill. 308.) and the motion of defendant to vacate the judgment entered after default should have been allowed. The Andrew case, 271 Ill. 404, cited by defendant in error, does not undertake to overrule the Gillman case supra.

ARGUMENT AND REASONING.

109 - 22049

W. B. CRANE and O. F. CRANE, trading as W. B. CRANE & COMPANY,
Defendants in Error,

vs.

TOOKER STORAGE & FORWARDING COMPANY,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

204 I.A. 354

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was an action in replevin in which judgment for possession and nominal damages was rendered in plaintiffs' favor. The lumber replevined was shipped by plaintiffs from Kentucky to themselves in Chicago. The initial carrier deviated from plaintiffs' instructions in routing it by other connecting carriers than they specified, by reason of which plaintiffs declined to pay the accrued charges of transportation, whereupon the lumber was stored by the last or next to the last carrier ~~(which is immaterial)~~ with defendant, a licensed public warehouseman, who advanced the accrued railroad charges and duly notified plaintiffs of the receipt of the property and of the amount of the charges. Plaintiffs again refused to make payment and brought replevin for the goods, with the result stated.

The sole question presented is whether defendant had a lien for such charges, it apparently being conceded that if it did the action of replevin could not be maintained without payment of them.

The basis of plaintiffs' claim is that the initial carrier's violation of its contract by misrouting

109 - 22049

W. E. CHANK and C. T. CHANK, trading as W. E. CHANK & COMPANY, Defendants in Error,	ERROR TO
vs.	MUNICIPAL COURT OF CHICAGO.
TOOKER STORAGE & FORWARDING COMPANY, Plaintiff in Error.	

MR. PRESIDING JUSTICE HARKER
DELIVERED THE OPINION OF THE COURT.

This was an action in replevin in which judgment for possession and nominal damages was rendered in plaintiff's favor. The lumber replevined was shipped by plaintiff from Kentucky to themselves in Chicago. The initial carrier deviated from plaintiff's instructions in routing it by other connecting carriers than they specified, by reason of which plaintiff declined to pay the accrued charges of transportation, whereupon the lumber was stored by the last or next to the last carrier (where, [illegible]) with defendant, a licensed public warehouseman, who advanced the accrued railroad charges and duly notified plaintiff of the receipt of the property and of the amount of the charges. Plaintiff then refused to make payment and brought replevin for the goods, with the result stated.

The sole question presented is whether defendant had a lien for such charges, it admittedly being conceded that if it did the action of replevin could not be maintained without payment of them.

The basis of plaintiff's claim is that the initial carrier's violation of its contract by misrouting

the shipment destroyed any lien that might otherwise exist for the accrued charges and storage. Support for this position is found in Fitch v. Newberry, 1 Doug. (Mich.) 1, but it is against the weight of authority. Patten et al. v. Union Pacific Ry. Co., 29 Fed. 590; D. & R. G. Ry. Co. v. Hill, 13 Colo. 35; Briggs v. B. T. R. R. Co., 80 Mass. (6 Allen) 246; Glover v. R. R. Co., 25 Mo. App. 369. The cases cited sustain the right of a lien for transportation charges thus incurred and advanced and hold that it is not lost by reason of the initial carrier's violation of the shipper's instructions as to routing. They support the doctrine, too, that while the initial carrier is the agent of the owner or shipper it is clothed with apparent authority to forward the goods by any ordinary or usual route.

The doctrine of special agency was invoked in some of those cases, as it is here, but they held it inapplicable and the reasoning thereon confutes the theory that succeeding carriers are bound to inquire into the existence of the initial carrier's authority in order to preserve a lien for their charges. Authorities in our own state too support the doctrine that the initial carrier and succeeding carriers or warehouseman each becomes the agent of the shipper and that there is an implied authority to pay for him the previous accrued charges of transportation. Bissel et al. v. Price, 16 Ill. 408; I. C. R. R. Co. v. Alexander, 20 id. 23; U. S. Express Co. v. Haines, 67 id. 137; Schumacher v. C. & N. W. Ry. Co., 207 id. 199.

The doctrine of special agency being inapplicable, and the right of a lien for such charges under such circumstances being clearly sustained by authority, plaintiffs could not maintain their action without first making or tendering payment of such charges. Accordingly judgment

the shipper, destroyed any lien they might otherwise exist for the accrued charges and storage. Support for this position is found in Fitch v. Newberry, 2 Dom. (Pick.) 1, but it is against the weight of authority. Patten et al. v. Union Pacific Ry. Co., 25 Kan. 300; Ch. & A. R. R. Co. v. Hill, 13 Colo. 95; Green v. C. & A. R. Co., 64 Mass. (6 Allen) 240; Flower v. L. & N. Co., 75 Ala. 189. The cases cited sustain the right of a lien for transportation charges plus insurance and advances and hold that it is not lost by reason of the initial carrier's violation of the shipper's instructions as to routing. They support the doctrine, too, that while the initial carrier in the absence of the owner or shipper it is clothed with apparent authority to forward the goods by any ordinary or usual route.

The doctrine of apparent agency was invoked in some of those cases, as it is here, but they call it inapplicable and the reasoning therein vacates the theory that succeeding carriers are [illegible] to inquire into the existence of the initial carrier's authority in order to preserve a lien for their charges. Authorities in our own state too support the contention that the initial carrier and succeeding carriers are [illegible] each [illegible] the agent of the shipper and that there is an implied authority to pay for him the proximate accrued charges of transportation. Chapel v. [illegible], [illegible]; L. & [illegible] v. Newberry, 20 Id. 8; L. & [illegible] Co. v. Quinn, 27 Id. 127; Schumacher v. [illegible] Co., 77 Id. 1[illegible].

The doctrine of apparent agency being [illegible], and the right of a lien for prior charges under such circumstances being clearly established in this [illegible] could not maintain that [illegible] which is just [illegible] therefore payment of such charges [illegible] reasonably [illegible]

should be reversed and the case will be remanded with direction for a retorno unless the accrued charges, as aforesaid, and the costs of the suit are paid.

REVERSED AND REMANDED.

should be reversed and the case will be remanded with direction for a reference unless the accrued charges, as aforesaid, and the costs of the suit are paid.

REVERSED AND REMANDED.

168 - 22119

204 I.A. 371

GEORGE T. COOKE COMPANY,
Appellee,

vs.

E. R. STEGE BREWERY et al.,
in the matter of the intervening petition of Vincent D. Wyman et al., copartners as Wyman, Jurgens & Carpenter,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of court dismissing the intervening petition of appellants filed in a suit brought on a bill of interpleader to determine the right to a certain fund which the complainant therein had paid into court.

The interveners set up in their petition that one of the defendants, Ahern, had assigned to them his interest in said fund after the issues had been formed between the defendants as to their respective rights. The record discloses that the interveners were attorneys at law and represented the assignor at a certain stage of the controversy over the fund and that one of them is his solicitor in said suit. In view of these circumstances we think the court committed no error in dismissing the petition.

AFFIRMED.

168 - 22110

GEORGE T. JOCKS COMPANY,
Appellee,

vs.

J. R. STANLEY WHEATLY et al.,
In the matter of the intervening petition of Vincent Tyman et al., copartners as Tyman, Jurgens & Carpenter,
Appellants.

MR. PRESIDING JUSTICE BARRETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of court dismissing the intervening petition of appellants filed in a suit brought on a bill of interpleader to determine the right to a certain fund which the complainant therein had paid into court.

The intervenors set up in their petition that one of the defendants, Jurgens, had assigned to them his interest in said fund after the issues had been formed between the defendants as to their respective claims. The record discloses that the intervenors were duly sworn to law and represented the assignor as a certain claimant of the controversy over the fund involved, and at least in the collector is not said. In view of these circumstances we think the court committed no error in dismissing the petition.

AFFIRMED.

169 - 22120

204 I.A. 372

GEORGE J. COOKE COMPANY, a corporation, Appellee,	
vs.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
E. R. STEGE BREWERY et al., On appeal of PATRICK AHERN, Appellant.	

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The Geo. J. Cooke Company filed a bill of interpleader to require the defendants, E. R. Stege Brewery and Patrick Ahern, to interplead and determine between themselves which was entitled to the rent of certain premises leased to and occupied by the Cooke Company, the rent having been demanded from it by each of the defendants. The Cooke Company tendered and was ordered to pay the rent into court, and the defendants were directed to interplead. Each filed an answer setting up his claim to said rents. The Brewery's claim is predicated upon a sheriff's deed issued upon an execution sale of said premises under a judgment for $1605.38 recovered by it against said Ahern. The latter's claim is predicated on the facts that he was the lessor, that at the time of the execution sale he owned an estate of homestead in the premises and that said sale was void because of the existence of such homestead, and because it was not then set-off to him and because the equity of redemption in the premises was not at that time nor since worth $1,000. Ahern also filed a cross bill praying that said sheriff's deed be decreed a cloud upon his title and that the same be removed. In

165 - 22120

GEORGE J. COOKE COMPANY, a corporation, Appellee,	
vs.	
K. R. STEGE BREWERY et al., On appeal of PATRICK AHERN, Appellant.	

AUTRAL ZONE

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE MACNEIL DELIVERED THE OPINION OF THE COURT.

The Geo. J. Cooke Company filed a bill of interpleader to require the defendants, K. R. Stege Brewery and Patrick Ahern, to interplead and determine between themselves which was entitled to the rent of certain premises leased to and occupied by the Cooke Company, the rent having been demanded from it by each of the defendants. The Cooke Company tendered and was ordered to pay the rent into court, and the defendants were directed to interplead. Each filed an answer setting up his claim to said rents. The Brewery's claim is predicated upon a sheriff's deed issued upon an execution sale of said premises under a judgment for $1600.00 recovered by it against said Ahern. The latter's claim is predicated on the facts that he was the lessor, that at the time of the execution sale he owned an estate of homestead in the premises and that said sale was void because of the existence of such homestead, and because it was not true-all to his and because the equity of redemption in the premises was not at that time nor since worth $1,000. Ahern also filed a cross bill praying that said sheriff's deed be declared a cloud upon his title and that the same be removed. In

addition to the issues raised by defendants' interpleading, issues were formed on the cross bill. On cross complainant's motion a reference was made to a master in chancery to take testimony and report his conclusions of fact and law. The only real issue of fact presented either by the answers or under the cross bill was whether Ahern had abandoned his homestead right. It is conceded, however, that a homestead estate had already been adjudicated in his favor in the suit of Dooley v. Ahern, (191 Ill. App. 140) to which the Brewery was a party. The only proofs offered related to that issue and the value of the equity of redemption. The master's report sustained Ahern's claims to a homestead right and the value of the equity of redemption, and recommended the setting aside of the execution sale. No exceptions were filed, and the findings were confirmed by the decree. Before entry thereof, however, Ahern moved the court for leave to dismiss his cross bill. The motion was denied and it was decreed that the sale and deed be set aside, that the satisfaction of the execution be vacated and the judgment restored, and that the money left in the hands of the clerk, $561.55, be paid over to the Brewery and applied upon said judgment. By a previous order the court had directed the clerk to pay the master's fees of $188.45 from said funds. The decree further provided that the master's fees be not taxed against any of the parties and that the other costs be taxed against Ahern. Ahern appealed from such decree.

The main question is whether or not the court properly disposed of the fund or rents in controversy. The legal right to the rent from the premises was the only question at issue. It followed from the court's finding of

addition to the issues raised by defendants' interpleading, issues were formed on the cross bill. On cross complainant's motion a reference was made to a master in chancery to take testimony and report his conclusions of fact and law. The only real issue of fact presented either by the answers or under the cross bill was whether Ahern had abandoned his homestead right. It is conceded, however, that a homestead estate had already been adjudicated in his favor in the suit of Dooley v. Ahern, 191 Ill. App. 140, to which the Drewery was a party. The only proofs offered related to that issue and the value of the equity of redemption. The master's report sustained Ahern's claims to a homestead right and the value of the equity of redemption, and recommended the setting aside of the execution sale. No exceptions were filed, and the findings were confirmed by the decree. Before entry thereof, however, Ahern moved the court for leave to dismiss his cross bill. The motion was denied and it was decreed that the sale had been set aside, that the satisfaction of the execution be vacated and the judgment restored, and that the money left in the hands of the clerk, $981.45, be paid over to the Drewery and applied upon said judgment. By a previous order the court had directed the clerk to pay the master's fees of $188.45 from said funds. The decree further provided that the master's fees be not taxed against any of the parties and that the other costs be taxed against Ahern. Ahern appealed from such decree.

The main question is whether or not the court properly disposed of the fund on hand in controversy. The legal right to the sum from the sheriff was the only question at issue. It followed from the master's findings of

a homestead estate in Ahern and that the equity of redemption was not worth $1,000, that the sheriff's deed to the Brewery was void. This does not seem to be questioned. No right to the rents, therefore, was acquired thereby. Unless, therefore, the Brewery had an equitable lien thereon the court wrongfully applied the fund in the court's hands to a partial payment of the Brewery's judgment and improperly taxed the costs against appellant Ahern.

It is true, as was said in Chandler v. Morey, 195 Ill. App. 596, that where defendants to a bill of interpleader answer, the court may so shape its decree as to do complete equity between the parties, and "may fasten upon the fund in controversy any equitable lien or trust which one of the parties may have established, though the proprietary legal title and ownership belonged to the other." But there was neither any averment of fact in the pleadings to support an equitable lien to the fund on the part of the Brewery nor proof to establish one. Certainly none arose from the void deed or from the mere existence of the judgment. The sale and deed being void and the Brewery establishing no equitable lien it follows that Ahern, as the lessor and landlord of the premises, was entitled to collect the rent therefrom.

In that view of the case we need not decide whether the rent was an incident to the homestead, nor consider whether the court would have been justified in applying it to a partial satisfaction of the judgment on granting relief under the cross bill, for it is conceded that the court erred in not dismissing the cross bill. With the cross bill eliminated, there were no equitable rights for adjustment, and no question to adjudicate except which party was legally entitled to the rent. But were the cross bill to stand we fail to see upon

a homestead estate in Alaska and that the equity of redemption was not worth $1,000, that the sheriff's deed to the brewery was void. This does not seem to be questioned. No right to the realty, therefore, was acquired thereby. Unless, therefore, the brewery had an equitable lien thereon the court wrongfully applied the fund in the court's hands to a partial payment of the brewery's judgment and improperly taxed the costs against appellant Alaska.

It is true, as was held in Bernhardt v. Brown, 139 Ill. App. 396, that where defendants to a bill of interpleader answer, the court may in some rare cases so do complete equity between the parties, and "may limit upon the fund in controversy any equitable lien or trust which one of the parties may have established, though the respondents legal title and ownership belonged to the lower." But there was neither any agreement or fact in the record as to whether an equitable lien to the fund on the part of the brewery nor proof to establish one. Certainly none arose from the void deed or from the mere existence of the judgment. The sale and deed being void and the brewery establishing no equitable lien to follow the fund about, it was forced into the hand of the receiver, and [illegible] to [illegible] it the [illegible] therefore.

In such view of the case as [illegible] the court was an intruder in the homestead. [illegible] the court would very [illegible] justified in [illegible] trial anticipation of the judgment on [illegible] the cross bill, for it is [illegible] that [illegible] dismissing the cross bill. With the cross bill [illegible] there were no equitable rights for [illegible] to adjudicate except with party was [illegible] the fund. But were the cross bill in fact so [illegible]

what equitable theory the rents could be appropriated to satisfy said judgment.

Appellant contends that the bill of interpleader should have been dismissed because no proof was adduced in support of the main facts upon which it rested. None was necessary, for its averments were either admitted or not denied, thus leaving unquestioned complainant's right to file it.

It is also urged that said bill should have been dismissed for want of a necessary party, it appearing from the lease attached as an exhibit thereto, that the lessors of the premises were Ahern and said Dooley, whose interest was that of a mortgagee. The question whether Dooley should have been made a party was not raised below and is not, as the record stands, necessarily presented here. The undenied allegation of the bill was that complainant leaded the premises from, and attorned to, Ahern and there are no averments in the pleading or proof in the record to the contrary. The decree will, therefore, be reversed and the cause remanded for entry of a decree in conformity with this opinion.

REVERSED AND REMANDED.

what equitable theory the rents could be appropriated to satisfy said judgment.

Appellant contends that the bill of interpleader should have been dismissed because no proof was adduced in support of the main facts upon which it rested. None was necessary, for its averments were either admitted or not denied, thus leaving undenied complainant's right to file it.

It is also urged that said bill should have been dismissed for want of a necessary party, it appearing from the leases attached as an exhibit thereto, that the lessors of the premises were Ahern and said Cooley, whose interest was that of a mortgagee. The question whether Cooley should have been made a party was not raised below and is not, as the record stands, necessarily presented here. The undenied allegation of the bill was that complainant leased the premises from, and attorned to, Ahern and there are no averments in the pleading or proof in the record to the contrary. The decree will, therefore, be reversed and the cause remanded for entry of a decree in conformity with this opinion.

REVERSED AND REMANDED.

197 - 22149

204 I.A. 374

B. A. L. THOMPSON, Jr.,
Defendant in Error,

vs.

LUCIUS J. M. MALMIM and
LAURA U. MALMIN,
Plaintiffs in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Defendants below (plaintiffs in error) were denied a change of venue. Their petitions therefor brought them within the provisions of the statute and were heard on the day after they were filed and notice thereof given. To justify the court's action defendant in error cites Huston v. Wood, 263 Ill. 381, and Glos v. Gannett, 219 id. 213, holding that the reasonableness of the notice is a matter left to the discretion of the court. It does not appear from the record, nor do the facts support the inference, that the court denied the motion on the ground of want of reasonable notice. While the notice was served for two o'clock on the day the petitions were filed the motions were heard the following day. The parties were represented and record discloses no circumstances to indicate that a longer notice was required or usually given, or that there was any complaint of insufficient notice. The court can not arbitrarily deny a change of venue when one brings himself within the provisions of the statute.

It also appears that issues of fact were raised by the pleadings and that the court entered judgment without hearing evidence. The judgment will be reversed and the

H. A. L. THOMPSON, Jr.,
Defendant in Error,

vs.

LUCIUS I. M. MALMIN and
LAURA U. MALMIN,
Plaintiffs in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE HARKER
DELIVERED THE OPINION OF THE COURT.

Defendants below (plaintiffs in error) were denied a change of venue. Their petitions therefor brought them within the provisions of the statute and were heard on the day after they were filed and notice thereof given. To justify the court's action defendant in error cites Hudson v. Wood, 265 Ill. 301, and Olson v. Dennett, 218 id. 216, holding that the reasonableness of the notice is a matter left to the discretion of the court. It does not appear from the record, nor do the facts support the inference, that the court denied the motion on the ground of want of reasonable notice. While the notice was served for two o'clock on the day the petitions were filed the motions were heard the following day. The parties were represented and record discloses no circumstances to indicate that a longer notice was required or usually given, or that there was any complaint of insufficient notice. The court can not arbitrarily deny a change of venue when one brings himself within the provisions of the statute.

It also appears that issues of fact were raised by the pleadings and that the court entered judgment without hearing evidence. The judgment will be reversed and the

cause remanded.

REVERSED AND REMANDED.

205 - 22157

204 I.A. 375

In the Matter of the Petition of FLORENCE FERGUSON LEONARD, to be Discharged under the Insolvent Debtors Act,

Appellee,

vs.

IZA D. LEONARD, Judgment Creditor,

Appellant.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from an order of the county court releasing upon her petition a judgment debtor from the custody of the sheriff under a writ of capias ad satisfaciendum issued upon a judgment in tort against her wherein malice was the gist of the action. The court's order was based on the theory that the capias was improperly issued without an affidavit, such as is required by section 62, chap. 77, Hurd's Stat. 1913, p. 1500, following the decision of this court in Marshall Field & Co. v. Freed, 191 Ill. App. 621. But that decision was reversed by the Supreme Court in 268 Ill. 558, the court holding that such an affidavit is not required when the judgment is for a tort. As malice was the gist of the action the county court had no authority to enter the order. The order releasing the petitioner will, therefore, be reversed and the cause remanded with directions to vacate such order and dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS.

205 - 2187

2041A.372

In the Matter of the Petition of RUDOLPH FERGUSON LUCHARD, to be discharged under the Insolvent Debtors Act, Appellee, vs. IRA D. LUCHARD, Judgment Creditor, Appellant.	APPEAL FROM COURT, COOK COUNTY.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from an order of the county court releasing upon her petition a judgment debtor from the custody of the sheriff under a writ of capias ad satisfaciendum issued upon a judgment in tort against her wherein malice was the gist of the action. The court's order was based on the theory that the capias was improperly issued without an affidavit, such as is required by section 68, chap. 77, Hurd's Stat. 1913, p. 1800, following the decision of this court in Marshall Field & Co. v. Fried, 101 Ill. App. 681. But that decision was reversed by the Supreme Court in 206 Ill. 558, the court holding that such an affidavit is not required when the judgment is for a tort. As malice was the gist of the action the county court had no authority to enter the order. The order releasing the petitioner will, therefore, be reversed and the cause remanded with directions to vacate such order and dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS.

22181

228 - 22181

THE OHIO SALT COMPANY,
a corporation,
Defendant in Error,

vs.

THE BALTIMORE & OHIO RAILROAD
COMPANY, a corporation,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

204 I.A. 376

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This was a suit brought to recover damages for the loss of a shipment of salt delivered by the plaintiff below to the defendant Railroad Company as the initial carrier at Rittman, Ohio, for transportation to Camden, N. J., via Cleveland, Ohio. After a trial before the court without a jury, judgment was rendered against the Railroad Company for $183.50.

We shall disregard questions relating to the pleadings and consider the case with reference to the theory of liability on which the case was evidently tried, and whether the court applied correct principles of law to the evidence in the case.

The car in question reached Cleveland about 7 P. M. in the evening when it was placed in the company's yards where cars were received for classification and transfer. During the night and following morning the Cuyahoga river rose steadily and flooded the yards. A clear preponderance of the evidence showed that the flood was of unusual proportions, unprecedented, and such as could not have been reasonably anticipated by the railroad people. Had the conditions been normal the car could have

22181

228 - 22181

THE OHIO SALT COMPANY,
a corporation,
Defendant in Error,

vs.

THE BALTIMORE & OHIO RAILROAD
COMPANY, a corporation,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

204 I.A. 376

MR. PRESIDING JUSTICE PARKER
DELIVERED THE OPINION OF THE COURT.

This was a suit brought to recover damages for the loss of a shipment of salt delivered by the plaintiff below to the defendant Railroad Company as the initial carrier at Kilkenn, Ohio, for transportation to Camden, N. J., via Cleveland, Ohio. After a trial before the court without a jury, judgment was rendered against the Railroad Company for $183.80.

We shall disregard questions relating to the pleadings and consider the case with reference to the theory of liability on which the case was evidently tried, and whether the court applied correct principles of law to the evidence in the case.

The car in question reached Cleveland about 7 P. M. in the evening when it was placed in the company's yards where cars were received for classification and transfer. During the night and following morning the Cuyahoga river rose steadily and flooded the yards. A clear preponderance of the evidence showed that the flood was of unusual proportions, unprecedented, and such as could not have been reasonably anticipated by the railroad people. Had the conditions been normal, the car could have

been transferred about 11 P. M., though in the ordinary course of events it would have been made about 6 o'clock the next morning. Owing to the heavy rains and steady rise of the water into the yards it became necessary to assemble all the cinders, refuse, slag, etc., to repair the track as soon as conditions would permit in order to avoid delay of traffic, and practically all the engines so far as they could be used were employed during the night in the repair work. Under the circumstances it was impossible to get all the cars out of the yards to higher points or to transfer them to other tracks. The water had not been known to rise high enough before to damage the contents of cars in the yards. The preponderance of the evidence, therefore, was against plaintiff's theory that the damages ensued from unreasonable delay on the part of the defendant, and supported the latter's theory that the loss was occasioned solely by the flood, an act of God.

Defendant in error relies on the theory applicable in this state to intrastate commerce that where the negligence of the carrier is a contributing cause of the damage it cannot escape responsibility notwithstanding the act of God, and cites cases to that effect. But even if the facts justified holding the company negligent by reason of delay, still it being an interstate shipment the rule of liability laid down in the Federal Courts must govern. It is settled law that since the passage of the Carmack Amendment to the Interstate Commerce Act "the special regulations and policies of particular states upon the subject of the carriers' liability for loss or damage to interstate shipments, and the contracts of carriers with respect thereto, have been superseded." (Charleston & W. C. R. Co. v. Varnville Furniture

been transferred about 11 P. M., though in the ordinary course of events it would have been made about 6 o'clock the next morning. Owing to the heavy rains and steady rise of the water into the yards it became necessary to assemble all the cranes, rollers, slag, etc., to repair the track as soon as conditions would permit in order to avoid delay of traffic, and practically all the engines so far as they could be used were employed during the night in the repair work. Under the circumstances it was impossible to get all the cars out of the yards to higher points or to transfer them to other tracks. The water had not been known to rise high enough before to damage the contents of cars in the yards. The preponderance of the evidence, therefore, was against plaintiff's theory that the damages caused from unreasonable delay on the part of the defendant, and supported the latter's theory that the loss was occasioned solely by the flood, an act of God.

Defendant in error relies on the theory applicable in this state to interstate commerce that where the negligence of the carrier is a contributing cause of the damage it cannot escape responsibility notwithstanding the act of God, and cites cases to that effect. But even if the facts justified holding the company negligent by reason of delay, which it being an interstate shipment the rule of liability laid down in the Federal Courts must govern. It is settled law that since the passage of the Carmack amendment to the Interstate Commerce Act "the special regulation and policies of separate states upon the subject of the carriers' liability for loss or damage to interstate shipments, and the construction of carriers with respect thereto, have been superseded." (Charleston & C. R. R. Co. v. Varnville Furniture

Co., 237 U.S. 597; Adams Express Co. v. Croninger, 226 U. S. 491; Gamble-Robinson Co. v. Un. Pac. R. R. Co., 262 Ill. 400; P. P. U. Ry. Co. v. Corning & Co., 266 id. 515.) When the Federal government assumed exclusive control of interstate commerce it was with the undoubted purpose among other things of maintaining uniformity of obligation and liability on the part of the carriers. Passing on the question of the carrier's liability for an interstate shipment in Cincinnati, New Orleans & Texas Ry. Co. v. Rankin, 241 U. S. 319, the court said:

> "The shipment being interstate, rights and liability of the parties depend upon acts of Congress, the bill of lading, and common law rules as accepted and applied in Federal tribunals." (326)

The uniform bill of lading, under which the shipment moved provided:

> "No carrier or party in possession of any of the property herein described shall be liable for any loss thereof, or damage thereto, or delay caused by the act of God."

The federal rule of liability where the carrier seeks to be excused for non-delivery of goods caused by the act of God, is stated in Railroad Co. v. Reeves, 77 U. S. 176, as follows:

> "Where the proximate cause of damage to goods in the hands of a carrier is an act of God, the carrier is excused from liability, although his own negligence or delay may have contributed to the loss or damage as a remote cause thereof."

(See also St. L. I. M. & S. Ry. Co. v. Commercial Union Ins. Co., 139 U. S. 223; The Indrapura, 171 Fed. 929, and Empire State Cattle Co., et al. v. A. T. & S. F. Ry. Co., 135 Fed. 135.)

The facts in the last cited case are very like those at bar and what was said there is applicable here, namely, "that the direct proximate cause of the loss and

Co., 237 U.S. 297; Adams Express Co. v. Croninger, 226 U. S. 491; Gamble-Robinson Co. v. Un. Pac. R. R. Co., 262 Ill. 400; P. R. U. Ry. Co. v. Corning & Co., 206 Id. 515.) When the Federal government assumed exclusive control of interstate commerce it was with the undoubted purpose among other things of maintaining uniformity of obligation and liability on the part of the carriers. Pending on the question of the carrier's liability for an interstate shipment in Cincinnati, New Orleans & Texas Ry. Co. v. Rankin, 241 U. S. 319, the court said:

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The uniform bill of lading, under which the shipment moved provided:

> "No carrier or party in possession of any of the property herein described shall be liable for any loss thereof, or damage thereto, or delay caused by the act of God."

The federal rule of liability where the carrier seeks to be excused for non-delivery of goods caused by the act of God, is stated in Railroad Co. v. Reason, 77 U. S. 170, as follows:

> "Where the proximate cause of damage to goods in the hands of a carrier is an act of God, the carrier is excused from liability, although his own negligence or delay may have contributed to the loss or damage as a remote cause thereof."

(See also Mo. K. & T. R. R. Co. v. Commercial Union Ins. Co., 130 U. S. 252; The Indiana, 171 Fed. 597, and Empire State Cattle Co., et al. v. A. T. & S. F. Ry. Co., 135 Fed. 135.)

The facts in the last cited case are very like those at bar and what was said there is applicable here, namely, "that the direct proximate cause of the loss and

damage was an unprecedented and unexpected flood and attendant disaster that came wholly without anticipation on the part of the defendant company."

The court, therefore erred in refusing the propositions of law which stated the federal rule as to liability and in not finding the Railroad Company not guilty. Its judgment will be reversed with a finding of fact.

REVERSED.

damage was an unprecedented and unexpected flood and astounding disaster that came wholly without anticipation on the part of the defendant company."

The court, therefore erred in refusing the propositions of law which stated the federal rule as to liability and in not finding the Railroad Company not guilty. Its judgment will be reversed with a finding of fact.

REVERSED.

228 - 22181

FINDING OF FACT.

We find that the damage to the shipment in question was caused by a flood and not by a delay in transportation and that the proximate and sole cause of the loss was an act of God.

228 - 22101

FINDING OF FACT.

We find that the damage to the shipment in question was caused by a flood and not by a delay in transportation and that the proximate and sole cause of the loss was an act of God.

246 - 22200

ELIZABETH BAAB,
Defendant in Error,

vs.

ROYAL LIFE INSURANCE CO. OF CHICAGO, a corporation,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

204 I.A. 378

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The plaintiff in error issued a policy belonging to the class of industrial insurance to one Martin J. Hickey insuring his life in consideration of a weekly premium of 25¢ for the sum of $120 and providing for payment thereof "unto the executors or administrators of the insured," unless settlement shall be made under the following provisions:

> 2. FACILITY OF PAYMENT. "The Company may make any payment provided for in this policy to the executor, administrator, husband or wife, or any relative by blood or connection by marriage of the insured, or to any other person appearing to be equitably entitled to the same by reason of having incurred expense on behalf of the insured, for his or her burial, and the production by the Company of a receipt signed by any or either of said persons shall be conclusive evidence that all claims under this policy have been fully satisfied."

It also contained the following provision:

> 3. POLICY SOLE CONTRACT. "This policy contains the entire contract between the parties in question."

After Hickey's death, defendant in error, to whom he delivered the policy, produced the same to the Company, but the latter made a settlement therefor for less than its face value with the administrator, whose receipt for the amount paid was produced in evidence.

246 - 22200

ELIZABETH HAAK,
Defendant in Error,

vs.

ROYAL LIFE INSURANCE CO. OF CHICAGO, a corporation,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MARCUS
DELIVERED THE OPINION OF THE COURT.

The plaintiff in error issued a policy belonging to the class of industrial insurance to one Martin J. Hickey insuring his life in consideration of a weekly premium of 25¢ for the sum of $130 and providing for payment thereof "unto the executors or administrators of the insured," unless settlement shall be made under the following provisions:

> 2. PAYMENT OF PROCEEDS. "The Company may make any payment provided for in this policy to the executor, administrator, husband or wife, or any relative by blood or connection by marriage of the insured, or to any other person appearing to be equitably entitled to the same by reason of having incurred expense on behalf of the insured, for sick or for burial, and the production by the Company of a receipt signed by any or either of said persons shall be conclusive evidence that all claims under this policy have been fully satisfied."

It also contained the following provision:

> 3. POLICY THE CONTRACT. "This policy constitutes the entire contract between the parties in question."

After Hickey's death, defendant in error, to whom he delivered the policy, produced the same to the Company, but the latter made a settlement therefor for less than its face value with the administrator, whose receipt for the amount paid was produced in evidence.

The application for the policy was on a printed form. It contains no provision for naming a beneficiary, but at Hickey's request the agent wrote on the margin thereof "Beneficiary, Elzisbeth Baab."

In the case of Sheridan v. Prudential Ins. Co. of America, 128 Ill. App. 519, where an adjustment of the policy was made by the insurance company in accordance with provisions for payment identical with those above quoted, this court, following the decisions in Thomas v. Prudential Ins. Co., 148 Pa. 594, Brennan v. Prudential Ins. Co., 32 Atl. Rep. (Pa.) 1042, Metropolitan Life Ins. Co. v. Schaffer, 50 N. J. Law, 72, and other cases there cited, held that a settlement with the Company under such provisions discharged it from further liability. What was there said is applicable to the facts of this case and the policy under consideration. Whether the administrator holds the fund for the benefit of plaintiff in error as the beneficiary is not before us for decision. If she has a vested interest as beneficiary, we think, as stated in the Schaffer case, supra, that she holds it subject to said provision for payment and that the Company was discharged from further liability by payment in accordance therewith.

Reference is made in the brief for defendant in error to the case of Smith v. Metropolitan Life Ins. Co., 222 Pa. 226, where it was held that similar clauses in a like policy would not be permitted to over-ride rights fixed by the policy. There was no question in that case about a designated beneficiary, and here the policy is expressly made payable"unto the executor or administrator" unless there is a settlement as therein provided. It was both paid to and settled with the administrator in accordance with the

The application for the policy was on a printed form. It contains no provision for naming a beneficiary, but at Hickey's request the agent wrote on the margin thereof "Beneficiary, Alice in Wonderland."

In the case of Abraham v. Prudential Ins. Co. of America, 178 Ill. App. 518, where an adjustment of the policy was made by the insurance company in accordance with provisions for payment identical with those above quoted, this court, following the decisions in Thomas v. Prudential Ins. Co., 148 Pa. 396, Emerson v. Prudential Ins. Co., 22 Atl. Rep. (Pa.) 1044, Metropolitan Life Ins. Co. v. Schaffer, 30 N. J. Law, 72, and other cases there cited, held that a settlement with the Company under such provisions discharged it from further liability. What was there said is applicable to the facts of this case and the policy under consideration. Whether the administrator holds the fund for the benefit of plaintiff in error as the beneficiary is not before us for decision. If she has a vested interest as beneficiary, we think, as stated in Schaffer case, supra, that the bonds it subject to said provision for payment and that the Company was discharged from further liability by payment in accordance therewith.

Therefore in this case, as in the Hickel case, we find no error to the case of Smith v. Metropolitan Life Ins. Co., 222 Ill. 326, where it was held that similar clauses in a life policy would not be permitted to over-ride rights fixed by the policy. There was no question in that case that a designated beneficiary, and here the policy is expressly made payable "unto the executor or administrator" unless there is a settlement as therein provided. It was duly paid to and settled with the administrator in accordance with the

provisions thereof. As it contained "the entire contract between the parties" to it, a proper application of the law required the court to enter a judgment for the defendant as requested. The judgment will be reversed.

REVERSED.

provisions thereof. As it contained "the entire contract between the parties" to it, a proper application of the law required the court to enter a judgment for the defendant as requested. The judgment will be reversed.

REVERSED.

276 - 22230

SAMUEL C. PIRIE, JOHN T. PIRIE, GORDON L. PIRIE, JOHN W. SCOTT, ROBERT L. SCOTT, FREDERICK H. SCOTT, ANDREW McLEISH and BRUCE McLEISH, copartners doing business under the firm name and style of CARSON, PIRIE, SCOTT & CO.,
Plaintiffs in Error,

vs.

ETHEL HORWICH,
Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

204 I.A. 379

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error obtained a judgment in the Municipal Court against defendant in error on which an execution was issued and returned, marked "No property found and no part satisfied." Thereafter the judgment debtor was cited into court under section 64 of the Amended Municipal Court Act for examination concerning her property. She appeared at the time specified but failed to appear at the times to which continuances for a hearing were taken. Thereupon the court entered an order for a rule upon her to show cause why she should not be held in contempt of court. On the hearing thereof she appeared and objected to the legality of the supplemental proceedings for the reason that the bailiff had made no personal demand on her under the execution. Whereupon the court discharged the respondent and refused to vacate the order on the motion of the plaintiffs in error. In that the court erred. As stated in Freeman on Executions, Vol. 3, sec. 401, (3 Ed.) unless there is an entire absence of jurisdiction in commanding the judgment debtor to appear in supplemental proceedings,

SAMUEL C. PIRIE, JOHN T. PIRIE,
GORDON L. PIRIE, JOHN W. SCOTT,
ROBERT E. SCOTT, WENDERION H.
SCOTT, ANDREW MCLEISH and BRUCE
MCLEISH, copartners doing business
under the firm name and style of
GARDON, PIRIE, SCOTT & CO.,
Plaintiffs in Error,

vs.

ETHEL HOWDICH,
Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE ADAMS
DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error obtained a judgment in the Municipal Court against defendant in error on which an execution was issued and returned, marked "No property found and no part satisfied." Thereafter the judgment debtor was cited into court under section 64 of the Amended Municipal Court Act for examination concerning her property. She appeared at the time specified but failed to appear at the times to which continuances for a hearing were taken. Thereupon the court entered an order for a rule upon her to show cause why she should not be held in contempt of court. On the hearing thereof she appeared and objected to the legality of the supplemental proceedings for the reason that the bailiff had made no personal demand on her under the execution. Thereupon the court discharged the respondent and refused to vacate the order on the motion of the plaintiffs in error. In that the court erred. As stated in Freeman on Executions, Vol. 3, sec. 401, (3 ed.) unless there is an entire absence of jurisdiction in commanding the judgment debtor to appear in supplemental proceedings

the order must be obeyed and "the defendant can not obtain a vacation of the order by showing that the judgment or execution was irregular or erroneous." Cases are there cited relating to analogous proceedings under the New York statutes. The judgment debtor could not attack the return of the execution writ collaterally or thus purge herself from contempt for failure to comply with an order which the court had the jurisdiction to enter. The judgment will be reversed and the cause remanded for proceedings in conformity with this opinion.

REVERSED AND REMANDED.

the order must be obeyed and the defendant can not obtain a vacation of the order by showing that the judgment or execution was irregular or erroneous. Cases are there cited relating to municipal proceedings under the New York statutes. The judgment debtor would not attack the return of the execution until collateral or true purpose herself free contempt for failure to comply with an order which the court had the jurisdiction to enter. The judgment will be reversed and the cause remanded for proceedings in conformity with this opinion.

REVERSED AND REMANDED.

13 - 21541

2653

MINNIE ROEDEL et al.,
Plaintiffs in Error,

vs.

QUIN O'BRIEN et al.,
Defendants in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

204 I.A. 380

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error, who were the complainants below, filed a bill in equity against Quin O'Brien, William E. Hatterman both individually and as executor of the last will and testament of Friedrich Schramm, deceased, William D. Johnson, Elizabeth Stern, Frank Schramm, William Schramm, Herman Schramm, Ella Reetz, Josephine Frech, and George F. Gartung, wherein it was sought primarily to obtain an accounting for certain funds alleged to have been wrongfully withheld from the complainants. Service was had upon defendants O'Brien, Hatterman and Johnson, the latter being the attorney representing the said Hatterman while acting as executor under the said will, and so far as this writ of error is concerned, they are the only defendants interested here.

Briefly stated, the facts as related in the verified bill of complaint, are substantially as follows:

The said Friedrich Schramm died on December 29, 1906, leaving no direct heirs surviving him. Upon his death, defendant Elizabeth Stern, then known as Elizabeth Schramm, claimed to be his widow by virtue of an alleged marriage to the deceased, a short time before his death. The last will and testament, which was dated December 21,

MARIE ROGERS et al.,
Plaintiffs in error,

vs.

QUIN O'BRIEN et al.,
Defendants in error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE SCHOLFIELD DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error, who were the complainants below, filed a bill in equity against Quin O'Brien, William H. Harrenson both individually and as executor of the last will and testament of Frederick Johnson, deceased, William T. Johnson, Elizabeth Green, Frank Johnson, Hilliar Johnson, Herman Johnson, Ella Keets, Josephine Wilson, and George W. Gurtung, wherein it was sought primarily to obtain an accounting for certain funds alleged to have been wrongfully withheld from the complainants. Answers were filed upon defendants O'Brien, Harrenson and Johnson, the latter being the attorney representing the [illegible] while acting as executor under the [illegible], and to [illegible] of error is concerned, they are the only defendants interested here.

Briefly stated, the facts as reflected in the verified bill of complaint, [illegible] substantial [illegible] follows:

The said Frederick Johnson died on [illegible] 20, 1906, leaving no direct heirs surviving him. [illegible] death, defendant Elizabeth [illegible], then known as Elizabeth Johnson, claimed to be his widow by virtue of an alleged marriage to the deceased, a short time before his death. [illegible]

1906, devised and bequeathed all the decedent's estate, both real and personal, consisting of several parcels of land, and upwards of $20,000 in personal property, to the said Elizabeth Stern, and named the defendant Hatterman as executor.

Subsequently, certain but not all of the collateral heirs, and one George F. Gartung, a son-in-law of the deceased, brought proceedings not only to contest the said will but also to annul the alleged marriage between the deceased and the defendant Elizabeth Stern, on the ground of insanity of the deceased at the time of the execution of the said will and the consummation of the said marriage.

Prior to the institution of those proceedings, the said contesting heirs and Gartung, who were represented by the defendant O'Brien as their attorney in said proceedings, had entered into an agreement with the said O'Brien, by the terms of which the latter was to pay all the expenses of the said litigation, and if successful, he was to receive one-half of whatever property was recovered thereby.

Pursuant thereto, the said O'Brien, on February 29, 1908, on behalf of the said contestants, filed a bill of complaint to assail the validity of the last will and testament of the said Friedrich Schramm, deceased; and on July 10, 1908 he filed another bill to contest the validity of the marriage of the said Friedrich Schramm to the said Elizabeth Stern, and praying for an annulment thereof. No trial was had on the first bill, but on the second a trial was had before a court and jury which terminated in a verdict for the complainants. No decree, however, was entered, but the parties compromised their differences by way of a settlement agreement, dated September 22, 1910, whereby the said contestants were to receive all the personal

1929, devised and bequeathed all the decedent's estate, both real and personal, consisting of several parcels of land, and upwards of $2,000 in necessary money, to the said Elizabeth Stern, and named her executrix thereon as executor.

Unnecessary, certain heirs at law of the testatrix, and one George [illegible] Bertram, a son-in-law of the deceased, brought proceedings not only to contest the same will but also to annul the alleged marriage between the decedent and the defendant Elizabeth Stern, on the grounds of insanity of the decedent and the use of the execution of the said will and the ceremonial of the said marriage.

Later [illegible] in [illegible] proceedings, the said contesting heirs and [illegible], who were represented by the defendant [illegible] a [illegible] proceedings, had entered into an agreement [illegible] by the terms of which the [illegible] all the executors of the said [illegible] and if necessary, [illegible] one-half of [illegible] thereof.

[illegible] Bertram, the [illegible], [illegible] in [illegible] of [illegible] to [illegible] testament of the [illegible] only [illegible] filed [illegible] to contest [illegible] of [illegible] Elizabeth Stern, and [illegible] the [illegible] [illegible] but the parties [illegible] settlement [illegible] the said contestants were [illegible]

property of the said Schramm estate, provided it aggregated more than $21,000, and the said Elizabeth Stern was to receive all the real property of the said estate and a certain burial lot.

Pursuant to the said settlement agreement, the defendant Hatterman, as executor, assigned and turned over upwards of $21,000 to said O'Brien, a part of which the latter distributed among the various contestants; and the real property was conveyed to the said Elizabeth Stern free and clear of any incumbrances arising out of the pendency of the two foregoing suits; and subsequently the two said suits were dismissed.

On December 14, 1910, the said Hatterman presented to the Probate Court of Cook County his final account and report as executor of the said estate, and requested that same be approved and that he be discharged as executor. The said Elizabeth Stern repudiated the aforesaid settlement agreement and appeared in said court and objected to the final account, later filing written objections thereto. Subsequently hearings were had thereon but the said final account was never approved in the Probate Court. On September 26, 1911 the said Hatterman filed a bill of complaint in the circuit court against the said Elziabeth Stern and other defendants, praying for an injunction restraining the said Elizabeth Stern from objecting to his said final account, and that the said agreement of settlement entered into between the said contestants and Elizabeth Stern be declared a good and binding obligation.

On November 3, 1911 the said Hartman filed a petition in the said suit, alleging a contract between himself and the said Elizabeth Stern, whereby the latter agreed to pay him $1,500 for his attorney, for representing him

property of the said Bowman estate, provided it aggregated more than $21,000, and the said Elizabeth Stern was to receive all the real property of the said estate and a certain burial lot.

Pursuant to the said settlement agreement, the defendant Rattenman, as executor, assigned and turned over upwards of $21,000 to said O'Brien, a part of which the latter distributed among the various contestants; and the real property was conveyed to the said Elizabeth Stern free and clear of any incumbrances arising out of the pendency of the two foregoing suits; and subsequently the two said suits were dismissed.

On December 14, 1910, the said Rattenman presented to the Probate Court of York County his final account and report as executor of the said estate, and requested that same be approved and that he be discharged as executor. The said Elizabeth Stern repudiated the aforesaid settlement agreement and appeared in said court and objected to the final account, later filing written objections thereto. Subsequently hearings were had thereon but the said final account was never approved by the Probate Court. On September 26, 1911 the said Rattenman filed a bill of complaint in the circuit court against the said Elizabeth Stern and other defendants, praying for an injunction restraining the said Elizabeth Stern from objecting to his said final account, and that the said agreement of settlement entered into between the said contestants and Elizabeth Stern be declared a good and binding obligation.

On November 3, 1911 the said Rattenman filed a petition in the said suit, alleging a contract between himself and the said Elizabeth Stern, whereby the latter agreed to pay him $1,500 for his attorney's services in the

and the estate in the various suits, and that $300 had already been paid to defendant Johnson, his attorney. The petition also prayed that an order be entered directing the transfer of the said estate from the Probate court to the circuit Court, and sought an approval of his final account as executor. Accordingly, an order was entered, pursuant to which the said estate was transferred to the circuit court for administration, and later a decree was entered, affirming the said settlement agreement and decreeing that the said attorney for Hatterman have a lien for the balance of his fee on the real estate which the said Elizabeth Stern received from the said estate. This decree was entered on May 4, 1912.

The bill of complaint filed herein charges, inter alia, that the said O'Brien has not accounted for all the moneys recovered from the said estate, and further, that the said Hatterman has failed to account for the full amount of personal property which came into his possession as executor; and prays that the said decree of May 4, 1912 entered by the circuit court be declared null and void as to the complainants herein, for want of jurisdiction of the court over their persons, and that the aforesaid settlement agreement be declared to be a good and binding contract and obligation; that complainants be allowed to file objections to the said final account and report of Hatterman, and that defendants O'Brien, Hatterman and Johnson be ordered to account to complainants for all moneys and personal property belonging to the said estate, and that should the court be of the opinion that complainants are barred from objecting to the said final account and report of the said Hatterman, defendant O'Brien be obliged to account for and pay to them the amount of money and property lost by reason of his alleged negligence to advise them of their rights in the premises.

and the estate in the various suits, and that $800 had already been paid to defendant Johnson, his attorney. The petition also prayed that an order be entered directing the transfer of the said estate from the probate court to the circuit court, and sought an approval of an final account as executor. Accordingly, an order was entered, pursuant to which the said estate was transferred to the circuit court for administration, and later a decree was entered, affirming the said settlement agreement and decreeing that the said attorney for Hattersman have a lien for the balance of his fee on the real estate which the said Hattersman received from the said estate. This decree was entered on July 4, 1912.

The bill of complaint filed herein charges, inter alia, that the said Hattersman has not accounted for all the moneys recovered from the said estate, and further, that the said Hattersman has failed to account for the full amount of personal property which came into his possession as executor; and prays that the said decree of July 4, 1912 entered by the circuit court be declared null and void as to the complainants herein, for want of jurisdiction of the court over their persons, and that the aforesaid settlement agreement be declared to be void and binding, contrary to public policy; that complainants be allowed to file objections to the said final account and report of Hattersman, and that defendants O'Brien, Hattersman and Johnson be ordered to be and to appear in court to complainants for all moneys received by them or any according to the said estate, and that upon hearing of the matter that complainants are entitled from and after the said final account and report of the said Hattersman, and that O'Brien be obliged to account for and pay to them the amount of money and property lost by reason of his alleged negligence to advise them of their rights in the premises.

To the amended bill of complaint demurrers were filed by defendants O'Brien, Hatterman, (both individually and as executor), and William D. Johnson, all of which upon hearing were sustained, and the said bill of complaint was subsequently dismissed by the court for want of equity. One of the grounds set forth in the demurrers of defendants O'Brien and Hatterman, was multifariousness.

Complainants contend on this writ of error, that their said bill of complaint is not obnoxious to demurrer for this or any other reason, and that the court erred in sustaining the said demurrers and dismissing the bill.

A bill is multifarious which seeks relief in matters arising out of independent and distinct items, the improper consolidation of which would lead to confusion. (Gage v. Parker, 103 Ill. 528.) Multifariousness may be defined in various other ways, but in each instance the question whether or not a bill is subject to this objection depends upon the particular facts in the case, and therefore no rule, however comprehensive, can serve as an infallible guide in determining this question. It rests in the sound discretion of the court to say whether or not a bill is multifarious. North American Ins. Co. v. Yates, 214 Ill. 272.

Complainants lay particular stress upon the fact that their bill of complaint has but one purpose, viz., to secure what is due them under the aforesaid settlement agreement.

It will be noted from the bill of complaint contained in the record now before this court, that complainants' cause of action against defendant O'Brien is based upon their agreement of February 25, 1907, whereby he was to receive as his fee, one-half of any personal property recovered from the said estate, the other half to go to the

To the amended bill of complaint demurrers were filed by defendants O'Brien, Bettencourt, Ivers individually and as executor), and Williams [illegible], all of which upon hearing were sustained, and the said bill of complaint was subsequently dismissed by the court for want of equity. One of the grounds set forth in the demurrers of defendants O'Brien and Bettencourt, was misjoinder.

Complainants [illegible] on this ground, that their said bill of complaint is not duplicitous [illegible] for this or any other reason, [illegible] in maintaining the said demurrers and dismissing the bill.

[illegible] is multifarious [illegible] matters [illegible] the importance [illegible] (Case v. [illegible], 100 U.S. 99.) [illegible] defined in various [illegible] depends upon the [illegible] as a rule, [illegible] made in [illegible] multifarious. [illegible]

[illegible] that [illegible] source [illegible] agreement.

[illegible] in [illegible] Their agreement of February 26, 1927, [illegible] receive as his fee, one-half of any [illegible] derived from the said estate, the other half to go to [illegible]

complainants. Their principal grievance against defendant O'Brien now is, that he has failed to surrender to them their full share of the property recovered.

While the common source of all of the complainants' claims was the aforesaid settlement agreement, yet the claims themselves are separate and distinct, - the one against defendant O'Brien being based upon a special agreement between the parties, contingent upon the successful culmination of the litigation therein contemplated, while that against defendants Hatterman and Johnson is predicated upon the settlement agreement itself. If the said Hatterman as executor has failed to account for all the property that came into his hands as such, upon proper showing such an account could be required in the probate court or in the proceedings in the circuit court, to which the administration of the said estate had been transferred. But the relief sought in this bill against the said Hatterman is clearly of a different nature and is separate and distinct and entirely independent of the relief sought against the defendant O'Brien.

Manifestly, therefore, the several claims herein sought to be litigated are separate and distinct in their nature and have no relation or dependence upon one another, and for this reason the bill must be held to be multifarious. Story's Eq. Pl. sec. 271.

The bill of complaint further alleges that "if the court should be of the opinion that they (complainants) are precluded from objecting to said final account and report of said executor, then they pray that said Quin O'Brien may be required to account to them for the various sums of money and property lost to them by reason of his negligence, while acting in the capacity of their solicitor, and also while acting as their trustee under said agreement of

complainants. Their principal grievance against defendant O'Brien now is, that he has failed to surrender to them their full share of the property recovered.

While the common source of all of the complainants' claims was the aforesaid settlement agreement, yet the claims themselves are separate and distinct, - the one against defendant O'Brien being based upon a special agreement between the parties, contingent upon the successful culmination of the litigation therein contemplated, while that against defendants Halterman and Johnson is predicated upon the settlement agreement itself. If the said Halterman as executor had failed to account for all the property that came into his hands as such, they [illegible] [illegible] [illegible] an order as required in the probate court or in the proceedings in the circuit court, to [illegible] the administration of the estate had been transferred. [illegible] [illegible] of damages in their [illegible] against the said [illegible] [illegible] [illegible] of a different nature and is separate and [illegible] [illegible] entirely independent of the [illegible] [illegible] [illegible] [illegible].

Multifariously, [illegible], [illegible] [illegible] [illegible] herein enough [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] in their nature and have [illegible] [illegible] [illegible] [illegible] with one another, and for this reason [illegible] the [illegible] [illegible] multifarious. Story's Eq. Pl. sec. 271.

The [illegible] of [illegible] [illegible] [illegible] [illegible]. If the court of [illegible] [illegible] [illegible] [illegible] (in [illegible]) was prevented from [illegible] [illegible] [illegible] [illegible] of said [illegible], then they [illegible] [illegible] [illegible] may be required [illegible] [illegible] [illegible] the [illegible] sum of money and property lost to them by [illegible] [illegible] [illegible], while acting in the capacity of their [illegible], and also

settlement, and in not requiring said William E. Hatterman to account for and assign and turn over to him for them all of the money and personal property which, under and by the terms of said agreement, belonged to them."

Assuming that damages would lie, as prayed for in the bill, clearly such a claim would have no relation to those hereinabove mentioned.

In view of the foregoing, we are of the opinion that the bill of complaint is multifarious, for which reason the court properly sustained the respective demurrers thereto. Accordingly the decree of dismissal will be affirmed.

AFFIRMED.

settlement, and in not requiring said William A. Masterson to account for and assign and turn over to him for them all of the money and personal property which, under and by the terms of said agreement, belonged to them."

Assuming that damages would lie, as prayed for in the bill, clearly such a claim would have no relation to those hereinabove mentioned.

In view of the foregoing, we are of the opinion that the bill of complaint in multifarious, for which reason the court properly sustained the respective demurrers thereto. Accordingly the decree of dismissal will be affirmed.

AFFIRMED.

622 - 22020

HANNIBAL TRUST COMPANY of Hannibal Mo., a corporation,
Appellee,

vs.

N. LANG and IDA LANG,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

204 I.A. 395

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

The judgment herein complained of was entered on a directed verdict in favor of the plaintiff (appellee).

Plaintiff's claim was based upon two certain promissory notes executed by defendants and payable to the World Manufacturing & Specialty Company, a corporation engaged in the manufacture of stamp vending machines, hereinafter referred to as the company.

During April, 1912, plaintiff entered into an agreement with the company, by the terms of which it agreed to purchase from said company, customers' notes representing part of the purchase price of stamp vending machines. This agreement also provided that the company would sell and assign to the plaintiff at a discount of six per cent (6%), the notes received by the company on account of the purchase price of stamp vending machines thereafter to be sold by it, to the amount of $10,000. It further provided that in case of failure by the makers to pay any of the notes at maturity or in the event any dispute arose from any claim of the makers of any of the notes so transferred, the company would at once receive back such notes and reimburse plaintiff to the extent of the moneys advanced; and that, by way of further protection to the plaintiff, the company agreed to

NATIONAL TRUST COMPANY of
Hannibal Mo., a corporation,
appellee,

ARKANSAS DIVN

vs.

MUNICIPAL COURT
OF CHICAGO.

H. LANG and ION LANG,
appellants.

MR. JUSTICE MCDONALD DELIVERED THE OPINION OF THE COURT.

The judgment herein complained of was entered on a directed verdict in favor of the plaintiff (appellee).

Plaintiff's claim was based upon two certain promissory notes executed by defendants and payable to the World Manufacturing & Specialty Company, a corporation engaged in the manufacture of coin vending machines, hereinafter referred to as the company.

During April, 1918, plaintiff entered into an agreement with the company, by the terms of which it agreed to purchase from said company, on stated notes for remaining part of the purchase price of slump vending machines. This agreement also provided that the company could sell and assign to the plaintiff as a discount of six per cent (6%), the notes received by the company on account of the purchase price of slump vending machines thereafter to be sold by it, to the amount of $2,000. It further provided that in case of failure by the makers to pay any of the notes at maturity or in the event any stipulation should fail of the makers of any of the notes to transpire, the company would at once receive back such notes and return plaintiff to the extent of the money advanced; and that, by way of further protection to the plaintiff, the company agreed to

transfer and deliver to the plaintiff collateral securities, with power in the plaintiff to pledge or sell same if necessary, in order to fully indemnify and repay to plaintiff any loss incurred or sustained on account of the purchase of any of said notes.

It was alleged by way of defense, that there was a breach of warranty, also a failure of and fraud in the consideration, and that plaintiff was not the real owner of the notes in question but held them only for collection; that if it acquired them as purchaser, it was not a holder in due course within the meaning of section 52 of the Negotiable Instruments act, ch. 98, R. S. of Illinois.

Upon the trial, plaintiff introduced the notes in evidence and then rested, after which certain evidence was introduced on behalf of the defendants, consisting of two depositions and the testimony of one Oscar F. Foss, a former officer of the company, and of Nettie Lang, one of the defendants; the said depositions being read in evidence on behalf of both parties.

The deposition of V. N. Whaley, who was secretary of the plaintiff, was to the effect that the notes were bought from the company shortly after August 17, 1912; that neither the plaintiff nor any of its officers knew anything of the alleged infirmities; that they paid the face value of the notes, less six per cent (6%) discount therefor. He further testified that under the contract between plaintiff and the company other notes had been purchased, aggregating about $17,000; that of the notes purchased; certain of them were not paid at maturity and were charged back to the company; that this was not done until some time after the notes herein sued upon had been purchased.

transfer and deliver to the plaintiff unlimited accounting, with power in the plaintiff to change or call back if necessary, in order to fully indemnify and repay to plaintiff any loss incurred or sustained on account of the purchase of any of said notes.

It was alleged by way of defense, that there was a breach of warranty, also a failure of and fraud in the consideration, and that plaintiff was not the real owner of the notes in question but held them only for collect n; that if it acquired them on purchase, it was not a holder in due course within the meaning of section 52 of the Negotiable Instruments Act, ch. 90, R. . . of Illinois.

Upon the trial, plaintiff introduced the notes in evidence and then rested, after a few formal witnesses were introduced on behalf of the defendants, consisting of the depositions and the testimony of one James . Cone, a former officer of the company, and of Frank Cone, one of the defendants; the said depositions being read in evidence on behalf of both parties.

The deposition of . . . , the secretary of the plaintiff, was to the effect that the notes were bought from the company shortly after . . . 12, 1911, . . . neither the plaintiff nor any of its . . . knew of the alleged infringement; that they paid the face value of the notes, less six per cent (6%) discount therefor. He further testifies that under the contract between plaintiff and the company other notes had been purchased, amounting about $17,000; that of the n ses purchased, certain of them were not paid at maturity and were charged back to the company; that this was not done until some time after the action herein sued upon had been purchased.

The testimony of J. T. S. Hickman, who was treasurer of the plaintiff, which was also submitted by way of deposition, was substantially to the same effect.

Defendants then introduced the aforesaid Oscar F. Foss, who testified that he had been vice president and general manager of the company. His testimony related to the circumstances which led up to the making of the contract wherein plaintiff agreed to purchase notes from the company.

Foss also testified that negotiations with plaintiff for the purchase of notes from the company were opened early in April, 1912, when he and one Curts, another officer of the company, called at the office of plaintiff at Hannibal, where they discussed with the aforesaid Whaley ways and means of raising funds for the company; that they disclosed the nature of the company's business and proposed discounting its customers' notes for that purpose; that Whaley took up the matter with the other officers of plaintiff, and subsequently entered into the aforementioned agreement, dated April 9, 1912.

Foss testified further, that at that time the said company had on hand upwards of $16,000 in customers' notes overdue, the payment of which, in many cases, would have to be enforced, and that the said Curts informed the said Whaley thereof at the time of these negotiations, and of the further fact that in many instances payment of notes was withheld because of defects in the vending machines for which the notes had been given, but that this difficulty would soon be effectively remedied by a change in the construction of the vending machines, which the officers of the company then had in contemplation.

In addition to the foregoing, the said Foss testified that in the course of these negotiations, Whaley

The testimony of J. T. U. Wisdom, who was treasurer of the plaintiff, which was also submitted by way of deposition, was substantially to the same effect.

Defendants then introduced the aforesaid Oscar Y. Zoss, who testified that he had been vice president and general manager of this company. His testimony related to the circumstances which led up to the making of the contract wherein plaintiff agreed to purchase notes from the company.

Zoss also testified that negotiations with plaintiff for the purchase of notes from the company were opened early in April, 1912, when he and one Curtis, another officer of the company, called at the office of plaintiff at Kansas, where they discussed with the aforesaid Wisdom ways and means of raising funds for the company; that they disclosed the nature of the company's business and proposed discounting its customers' notes for that purpose; that Wisdom took up the matter with the other officers of plaintiff, and subsequently entered into the aforementioned agreement, dated April 9, 1912.

Zoss testified further, that at that time the said company had on hand upwards of $18,000 in customers' notes overdue, the payment of which, in many cases, would have to be enforced, and that the said curtis informed the said Wisdom thereof at the time of these negotiations, and of the further fact that in many instances payment of notes was withheld because of defects in the vending machines for which the notes had been given, but that this difficulty would soon be effectively remedied by a change in the construction of the vending machines, which the officers of the company then had in contemplation.

In addition to the foregoing, the said Zoss testified that in the course of these negotiations, Wisdom

became fully aware that because of the defects in these machines some of the notes subsequently to be transferred to plaintiff by the company would not be paid, and that by way of anticipation of such contingencies, plaintiff required the deposit of collateral security by the said company.

All of the foregoing, it appears from the testimony of Foss, transpired before the Lang notes came into the possession of plaintiff, and during the interim upwards of $6,000 worth of notes in possession of plaintiff accrued but were unpaid, although the witness was not certain whether they were charged back to the company then or later; and that during this time the said Whaley made several inquiries as to the contemplated improvement in the vending machines.

Prior to the institution of the suit on the notes in question plaintiff received the following letter from the said Curts:

"April 10, 1913.

* *

"I was talking with a law firm here yesterday in regard to collecting notes. Some of these notes which you returned to us we have put in the hands of a collecting company and are bringing suit on them through J. H. Leonard as an innocent purchaser. They claim they should have no trouble in collecting these accounts if suit was brought through the original purchaser, which is your bank; but if suit was brought on by Leonard, they would be purchased by him after maturity.

"Why cannot the balance of the notes you have be handled through an attorney there in suit brought by the Hannibal Trust Company, or someone connected with your bank? This is the suggestion the attorney made to me; as you all are purchasers of these notes before maturity. They claim they know all of these notes could be collected if suit had been brought in this way first.

"Please let me know at once if you will do this and I will make arrangements with Chas. Rendlen to handle the notes; or you might do this, if it can be done."

It is contended by defendants that the trial court erred in directing a verdict for the plaintiff, and great

become fully aware that because of the defects in these machines some of the notes subsequently to be transferred to plaintiff by the company would not be paid, and that by way of anticipation of such contingencies, plaintiff required the deposit of collateral security by the said company.

All of the foregoing, it appears from the testimony of Yoss, transpired before the land notes came into the possession of plaintiff, and during the interim upwards of 6,000 worth of notes in possession of plaintiff accrued but were unpaid, although the witness was not certain whether they were charged back to the company then or later; and that during this time the said Shuley made several inquiries as to the contemplated improvements in the vending machines.

Prior to the institution of the suit on the notes in question plaintiff received the following letter from the said Curtis:

"April 24, 1918.

* * * * * * * * * * * * * * * * * *

"I was talking with a Jew from here yesterday in regard to collecting notes. Some of these notes which you returned to us we have put in the hands of a collecting company who are bringing suit on them through J. H. Leonard as an innocent purchaser. Those claim they should have no trouble in collecting these accounts if suit was brought through the original purchaser, which is your bank; but if suit was brought on by Leonard, they would be protected by the statute of limitations.

"Why cannot the balance of the notes you have be handled through an attorney there in suit brought by the Hannibal Trust Company, or someone connected with your bank? This is the suggestion the attorney made to me; as you are the purchasers of these notes before maturity. They claim they know all of these notes could be collected if this had been brought in this way first.

"Please let me know as soon if you will do this and I will make arrangements with the attorney to handle the notes; or you might do this, if it can be done."

It is contended by defendants that the trial court erred in directing a verdict for the plaintiff, and that

stress is laid upon the evidence in the record which tends to show that certain of the machines made by the company were unsatisfactory and that some of the notes given therefor were not paid at maturity; that plaintiff had knowledge thereof, and of the further fact that the company was at this time endeavoring to improve its output, and that with such knowledge, together with the other facts and circumstances in evidence, it was for the jury to determine whether or not plaintiff was a holder in due course of the Lang notes.

In order to facilitate the circulation of negotiable instruments, it has become the policy of the law to protect a bona fide holder of a note transferred before maturity, though he may have received it under circumstances which would tend to arouse suspicion in an ordinarily prudent person; in fact, it is held that even gross negligence on the part of the recipient of a negotiable instrument at the time of transfer, is not, as a matter of law, fatal to his title, and that nothing short of bad faith on his part will defeat his title thereto. This rule finds expression in Bradwell v. Pryor, 221 Ill. 602. The ultimate fact to be ascertained is the good or bad faith of the holder of the paper, and any competent evidence which may have an illuminative tendency on this issue, should be submitted to the jury. Daniels on Neg. Inst., 6 Ed. vol. 1, sec. 776; Kipp v. Smith, 137 Wis. 234, 118 N. W. 848.

After a most careful reconsideration of the record, we feel constrained to hold that it contains evidence which has some probative force on the ultimate question of the good or bad faith of the holder of the said notes. It therefore became a question to be passed upon by the jury, with the guidance of proper instructions; and in directing a verdict for the plaintiff, the court invaded the province of the jury

stress is laid upon the evidence in the record which tends to show that certain of the machines made by the company were unsatisfactory and that some of the notes given therefor were not paid at maturity; that plaintiff had knowledge thereof, and of the further fact that the company was at this time endeavoring to improve its output, and that with such knowledge, together with the other facts and circumstances in evidence, it was for the jury to determine whether or not plaintiff was a holder in due course of the long notes.

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After a most careful reexamination of the record, we feel constrained to hold that it contains evidence which has some probative force on the ultimate question of the good or bad faith of the holder of the said notes. It therefore becomes a question to be passed upon by the jury, with the guidance of proper instructions; and in directing a verdict for the plaintiff, the court invaded the province of the jury

which requires a reversal of the judgment.

The further point is made by defendants, that the court erroneously excluded certain evidence offered on their behalf to show a failure of consideration of these notes, and that they were obtained through fraud and misrepresentation.

Apparently the ruling of the court was based upon the supposition that plaintiff had by competent evidence shown itself to be a holder in due course, of the Lang notes. But the countervailing evidence submitted on behalf of the defendants made the question of good or bad faith on the part of plaintiff in purchasing these notes, one of fact. The evidence in question was therefore admissible.

For the reasons hereinabove assigned, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

which requires a reversal of the judgment.

The further point is made by defendants, that the court erroneously excluded certain evidence offered on behalf of the plaintiff to show a failure of consideration of the notes, and that they were obtained via the fraud and misrepresentations.

Concerning the ruling of the court [illegible] and upon the proposition that parol evidence by commonly accepted views, itself be in a holder in due course, of the [illegible] but the complaining evidence [illegible] of the [illegible] in question was the [illegible] of [illegible] on the part of plaintiff in purchasing these notes, one of [illegible]. The evidence in question was therefore admissible.

For the reasons hereinbefore assigned, the judgment will be reversed and the cause remanded.

[illegible].

103 - 22043

ADOLPH J. SABATH and HARRY LEVINSON, doing business as Sabath & Levinson, Plaintiffs in Error,	ERROR TO MUNICIPAL COURT OF CHICAGO.
vs.	
BARBARA VACEK, ANNA VACEK and HATTIE VACEK, Defendants in Error.	

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error brought an action on a written contract against defendants in error, to recover the balance alleged to be due thereunder. The jury found the issues for the defendants and the court entered judgment on the verdict.

The only point involved in this case, is whether or not plaintiffs, comprising the firm of Sabath & Levinson, having contracted to render legal services to the defendants, can recover on the contract where they did not personally perform the services therein contemplated.

It is a well-settled principle of law, that where an attorney is employed to prosecute or defend a suit, or to perform other legal services, he cannot, without the special authorization of his client, transfer or delegate his duty to any other attorney. His employment involves a personal trust which cannot be delegated without the special consent of the client. Morgan et al. v. Roberts, 38 Ill. 65; Sloan v. Williams et al., 138 Ill. 43; Tobler v. Nevitt, 132 Am. St. Rep. 160 and note.

Plaintiffs contend, however, that defendants, by accepting the services of other members or employees of

103 - 22043

ADOLPH J. DASATH and HARRY LAVINSON, doing business as Dabath & Levinson, Plaintiffs in Error,	ERROR TO MUNICIPAL COURT OF CHICAGO.
vs.	
DASATA VADEK, AKA VADEK and HATTIE VADEK, Defendants in Error.	

24 I.A. 338

MR. JUSTICE MCDONALD DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error brought an action on a written contract against defendants in error, to recover the balance alleged to be due thereunder. The jury found the issues for the defendants and the court entered judgment on the verdict.

The only point involved in this case, is whether or not plaintiffs, comprising the firm of Dabath & Levinson, having contracted to render legal services to the defendants, can recover on the contract where they did not personally perform the services therein contemplated.

It is a well-ne tled principle of law, that where an attorney is employed to prosecute or defend a suit, or to perform other legal services, he cannot, without the special authorization of his client, transfer or delegate his duty to any other attorney. The employment involves a personal trust which cannot be delegated without the special consent of the client. Mecum et al. v. Johnston, 38 Ill. 65; Olson v. Williams et al., 153 Ill. 40; Cohen v. Kevitt, 132 Am. St. Rep. 360 and note.

Plaintiffs contend, however, that defendants, by

their law firm without protest, thereby ratified the act of the plaintiffs in delegating their duty to others. A complete answer to this contention is found in the fact that there is no evidence in the record that defendant Anna Vacek either expressly or impliedly assented thereto or that she had any knowledge that certain of the legal services contemplated by the said contract were being rendered by one Hoffman, an attorney in the employ of the plaintiffs; in the absence of which plaintiffs cannot maintain this action. Defendants' obligation under the said contract being a joint one, a recovery must be had against all or none. (Claflin v. Dunne, 129 Ill. 241.) Accordingly the judgment will be affirmed.

AFFIRMED.

their law firm without protest, thereby ratified the act of the plaintiffs in delegating their duty to others. A complete answer to this contention is found in the fact that there is no evidence in the record that defendant Anna Vacek either expressly or impliedly assented thereto or that she had any knowledge that certain of the legal services contemplated by the said contract were being rendered by one Hoffman, an attorney in the employ of the plaintiffs; in the absence of which plaintiffs cannot maintain this action. Defendants' obligation under the said contract being a joint one, a recovery must be had against all or none. (Griffin v. Dunne, 129 Ill. 241.) Accordingly the judgment will be affirmed.

AFFIRMED.

112 - 22054

OMAR H. WRIGHT and OLIVER L. WATSON, trustee, et al., Defendants in Error,	) ERROR TO
vs.	) CIRCUIT COURT, COOK COUNTY.
THOMAS H. MATTERS and MARGUERITE L. MATTERS, his wife, et al., Plaintiffs in Error.	)

204 I.A. 398

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This writ of error brings up for review the record of a foreclosure proceeding on a trust deed, in which a receiver was appointed and a deficiency decree entered against plaintiff in error, Thomas H. Matters.

In the said trust deed, which was attached to and made a part of the bill of complaint, the grantor conveyed as security for the payment of the debt therein described, certain real estate, with the improvements thereon, together with all the rents, issues and profits of said premises; and waived all right to the possession of or income therefrom, pending foreclosure proceedings and until the period of redemption from any sale thereof had expired; and agreed that upon the filing of any bill to foreclose the said trust deed, a receiver should at once be appointed to take possession or charge of the said premises, to collect the income therefrom, and such income, less receivership expenditures, including repairs, insurance premiums, taxes, assessments and receiver's commissions, should be paid to the person entitled to a deed under the certificate of sale, or in reduction of the redemption money if said premises were redeemed.

It appears that the court, in appointing the receiver, acted solely upon the authority contained in the aforementioned provision of the said trust deed. It is insisted by plaintiff in error, Thomas H. Matters, that the said provision was inserted therein solely for the benefit of the person entitled to a deed under the certificate of sale, and that inasmuch as such person is not entitled to the rents, issues and profits of the premises during the period of redemption, the entire provision is void.

It will be noted that the foregoing provision with respect to the appointment of a receiver has a two-fold purpose, viz.; to preserve the security, making all necessary expenditures incident thereto, and to pay the surplus, if any, to the holder of the deed under the certificate of sale.

It is true, the person entitled to the deed under the certificate of sale has no right to the rents, issues and profits collected from the said premises during the redemption period, because he derives his title solely by virtue of the statute and not under the trust deed. (Standish v. Musgrove, 223 Ill. 500; Schaeppi v. Bartholomae, 217 Ill. 105.) But this fact would affect the disposition of only the surplus funds remaining in the receiver's hands after payment of all necessary expenditures, and does not impair the validity of the provision for the appointment of a receiver for the purpose of preserving the security, particularly in view of the fact that the trust deed herein expressly pledged such rents, issues and profits for the payment of the debt.

As to the contention, that the court erred in entering judgment against plaintiff in error Thos. H. Matters on a deficiency decree, we are of the opinion that he is not precluded from raising that question in this court.

It appears that counsel for plaintiff in error

It appears that the court, in appointing the receiver, acted solely upon the authority contained in the aforementioned provision of the said trust deed. It is insisted by plaintiff in error, Thomas H. Masters, that the said provision was inserted therein solely for the benefit of the person entitled to a deed under the certificate of sale, and that inasmuch as such person is not entitled to the rents, issues and profits of the premises during the period of redemption, the entire provision is void.

It will be noted that the foregoing provision with respect to the appointment of a receiver has a two-fold purpose, viz.; to preserve the security, making all necessary expenditures incident thereto, and to pay the surplus, if any, to the holder of the deed under the certificate of sale.

It is true, the person entitled to the deed under the certificate of sale has no right to the rents, issues and profits collected from the said premises during the redemption period, because he derives his title solely by virtue of the statute and not under the trust deed. Lewington v. Bourgeois, 229 Ill. 600; Chappell v. Hutchinson, 247 Ill. 539.; But this fact would affect the disposition of only the surplus funds remaining in the receiver's hands after payment of all necessary expenditures, and does not impair the validity of the provision for the appointment of a receiver for the purpose of preserving the security, particularly in view of the fact that the trust deed herein expressly provides such rents, issues and profits for the payment of the debt.

As to the contention, that the court erred in entering judgment against plaintiff in error Thos. H. Masters, on a deficiency decree, we are of the opinion that he is precluded from raising that question in this court.

It appears that a demand for plaintiff in error

Thos. H. Matters approved the decree of sale entered herein, which recited that if the property in question sold for an amount insufficient to satisfy the debt, execution might issue against the said Matters, who was liable for the deficiency; the approval being indicated by the letters "O. K." and the signature of counsel.

It has been held that the abbreviation "O. K." has a well defined meaning and signifies, "all right," "correct;" the effect thereof being determined from the circumstances of the situation.

In the case at bar, no objection was anywhere made to the entry of the said decree. Under the circumstances, therefore, we are of the opinion that counsel, in approving the said decree intended that the notation "O. K." should indicate an unqualified assent, both as to the form and the propriety of its entry. Davis Paint Mfg. Co. v. Metzger Linseed Oil Co., 90 Ill. App. 117; I. D. & W. R. Co. v. Sands, 133 Ind. 433.

Finding no reversible error, the decree will be affirmed.

AFFIRMED.

Thos. H. Eastons approved the decree of sale entered herein, which recited that if the property in question sold for an amount insufficient to satisfy the debt, execution might issue against the said Eastons, who was liable for the deficiency; the approval being indicated by the letters "O. K." and the signature of counsel.

It has been held that the abbreviation "O. K." has a well defined meaning and signifies, "all right," "correct;" the effect thereof being determined from the circumstances of the situation.

In the case at bar, no objection was anywhere made to the entry of the said decree. Under the circumstances, therefore, we are of the opinion that counsel, in approving the said decree, intended that the notation "O. K." should indicate an unqualified assent, both as to the form and the propriety of the entry. Davis Paint Mfg. Co. v. Palmer Linseed Oil Co., 90 Ill. App. 127; L. M. & E. Co. v. Sands, 195 Ill. 452.

Finding no reversible error, the decree will be affirmed.

AFFIRMED.

135 - 22081

VALENTINE WOODS, Defendant in Error, vs. NORMAN McCRIMMIN, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This was a fourth class action in tort to recover damages for the alleged wrongful death of plaintiff's horse. The jury found the defendant (plaintiff in error) guilty and assessed plaintiff's damages in the sum of $200, upon which judgment was entered by the court.

The original statement of claim, after setting forth that defendant was bailee of the said horse, charged him with the unlawful conversion thereof, and with negligence in causing its death; both of which charges defendant denied in his affidavit of merits.

Subsequently plaintiff, by leave of court, filed an amendment to his statement of claim, in which he charged wilful and malicious conversion of the said horse; to which defendant's affidavit of merits theretofore filed was allowed to stand as a denial.

It is urged that the court erred in permitting plaintiff to file the said amended statement of claim. Underlying this contention is the theory of defendant, that in charging wilful and malicious conversion, it sets up a new cause of action which at the time of the filing of the amended statement of claim was barred by the statute of limitations, having been filed more than two years after

VALENTINE WOODS, Defendant in error,	
vs.	ERROR TO MUNICIPAL COURT OF CHICAGO.
NORMAN MOCHEMAN, Plaintiff in error.	

MR. JUSTICE MOSCHZER DELIVERED THE OPINION OF THE COURT.

This was a fourth class action in tort to recover damages for the alleged wrongful death of plaintiff's horse. The jury found the defendant (plaintiff in error) guilty and assessed plaintiff's damages in the sum of $200, upon which judgment was entered by the court.

The original statement of claim, after setting forth that defendant was bailee of the said horse, charged him with the unlawful conversion thereof, and with negligence in causing its death; both of which charges defendant denied in his affidavit of merits.

Subsequently plaintiff, by leave of court, filed an amendment to his statement of claim, in which he charged wilful and malicious conversion of the said horse; to which defendant's affidavit of merits thereto filed was allowed to stand as a denial.

It is urged that the court erred in permitting plaintiff to file the said amended statement of claim. Underlying this contention is the theory of defendant, that in charging wilful and malicious conversion, it set up a new cause of action which at the time of the filing of the amended statement of claim was barred by the statute of limitation, having been filed more than two years after

the cause of action accrued.

The statute of limitations is an affirmative defense, and in order to be availed of, it must be specially pleaded. (Heimberger v. Elliott Switch Co., 245 Ill. 448). Defendant having failed to do so, he thereby waived the benefit of this defense.

Other errors are complained of, which are based upon the rules of the municipal court, but inasmuch as this court does not take judicial notice thereof and they have not been preserved in the bill of exceptions, these questions cannot be passed upon.

Objection is raised to the form of the verdict, the ground thereof being that it cannot be determined from the verdict whether defendant was found guilty of a tort as charged in the original statement of claim, or of malice as charged in the amendment thereto. No instruction was requested to eliminate the charge of malice from the case nor was any objection to the form of the verdict made in the court below; the objection comes too late when raised in this court for the first time. 38 Cyc. 1904 and cases there cited.

Finding no error in the record which justifies a reversal, the judgment will be affirmed.

AFFIRMED.

the cause of action accrued.

The statute of limitations is an affirmative defense, and in order to be availed of, it must be specially pleaded. (Heimbecker v. Willett Switch Co., 248 Ill. 466). Defendant having failed to do so, he thereby waived the benefit of this defense.

Other errors are complained of, which are based upon the rules of the municipal court, but inasmuch as this court does not take judicial notice thereof and they have not been preserved in the bill of exceptions, these questions cannot be passed upon.

Objection is raised to the form of the verdict, the ground thereof being that it cannot be determined from the verdict whether defendant was found guilty of a tort as charged in the original statement of claim, or of malice as charged in the amendment thereto. No instruction was requested to eliminate the charge of malice from the case nor was any objection to the form of the verdict made in the court below; the objection comes too late when raised in this court for the first time. 40 Cyc. 1904 and cases there cited.

Finding no error in the record which justifies a reversal, the judgment will be affirmed.

AFFIRMED.

150 - 22098

H. L. CAVENDER and WM. E. KAISER, as CAVENDER & KAISER,
Plaintiffs in Error,

vs.

WILLIAM J. FOX,
Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This action was for fraud and deceit alleged to have been practiced by defendant on the plaintiffs. At the close of plaintiffs' case, the jury, by direction of the court, found the defendant not guilty, upon which verdict the judgment herein complained of was entered.

In their statement of claim, plaintiffs allege that the defendant wrongfully represented himself to be the agent of all of the defendants, for the purpose of employing plaintiffs as their associate counsel, in a certain case pending in the Municipal Court of Chicago at the time the representation was alleged to have been made; and that plaintiffs, relying thereupon, rendered legal services on behalf of the said litigants in the said case; and that subsequently to the rendition of said services, plaintiffs learned that defendant was not the agent of said litigants as represented by him to the plaintiffs.

The evidence adduced on behalf of plaintiffs tends to show that the defendant made representations to plaintiffs to the effect that he had seen all the defendants in the said case, all of whom had agreed to have plaintiffs act for them as associate counsel in the aforesaid litigation, and to

H. L. DAVENPORT and WM. A. KAISER, as DAVENPORT & KAISER, Plaintiffs in error,	ERROR TO
vs.	MUNICIPAL COURT
WILLIAM J. FOX, Defendant in Error.	OF CHICAGO.

MR. JUSTICE MORGAN DELIVERED THE OPINION OF THE COURT.

This action was for fraud and deceit alleged to have been practiced by defendant on the plaintiffs. At the close of plaintiffs' case, the jury, by direction of the court, found the defendant not guilty, upon which verdict the judgment herein complained of was entered.

In their statement of claim, plaintiffs allege that the defendant wrongfully represented himself to be the agent of all of the defendants, for the purpose of employing plaintiffs as their associate counsel, in a certain case pending in the Municipal Court of Chicago at the time the representation was alleged to have been made; and that plaintiffs, relying thereon, rendered legal services on behalf of the said litigants in the said case; and that subsequently to the rendition of said services, plaintiffs learned that defendant was not the agent of said litigants as represented by him to the plaintiffs.

The evidence adduced on behalf of plaintiffs tends to show that the defendant made representations to plaintiffs to the effect that he had seen all the defendants in the said case, all of whom had agreed to have plaintiffs act for them as associate counsel in the aforesaid litigation, and to

compensate them for their services; and that, relying upon such representation, plaintiffs performed the said services, after which they learned that defendant had no authority to engage them on behalf of all of said defendants. Evidence was also submitted as to the reasonable value of the said services.

Defendant, who was called to the witness stand under section 33 of the Municipal Court Act, testified that he saw only certain of the said defendants interested in the aforesaid suit, naming them; and denied that he made the foregoing representations to the plaintiffs, with respect to having obtained the unanimous consent of the defendants in said litigation, to engage plaintiffs for them.

Plaintiffs contend that on this state of the record the court erred in directing a verdict for the defendant.

In our opinion, the foregoing evidence offered on behalf of the plaintiffs was sufficient to make out a prima facie case of fraud and deceit, which the defendant was required to rebut, and his failure to do so would entitle plaintiffs to a recovery. Obviously, therefore, the court erred in directing the jury to find defendant not guilty, for which error the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

compensate them for their services; and that, relying upon such representation, plaintiffs performed the said services, after which they learned that defendant had no authority to engage them on behalf of all of said defendants. Evidence was also submitted as to the reasonable value of the said services.

Defendant, who was called to the witness stand under section 32 of the Municipal Court Act, testified that he saw only certain of the said defendants interested in the aforesaid suit, naming them; and denied that he made the foregoing representations to the plaintiffs, with respect to having obtained the unanimous consent of the defendants in said litigation, to engage plaintiffs for them.

Plaintiff contend that on this state of the record the court erred in directing a verdict for the defendant.

In our opinion, the foregoing evidence offered on behalf of the plaintiffs was sufficient to make out a prima facie case of fraud and deceit, so that the defendant was required to rebut, and his failure to do so would entitle plaintiffs to a recovery. Obviously, therefore, the court erred in directing the jury to find said defendant not guilty, for which error the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

156 - 22104

WILLARD C. HOWE, Defendant, in Error, vs. CHARLES C. O'NEILL and JOHN J. O'NEILL, copartners doing business as AMERICAN STORAGE FURNITURE AND EXPRESS CO., Plaintiffs in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

204 I.A. 402

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

By this writ of error it is sought to reverse a judgment for $650.00 and costs, rendered in favor of defendant in error (plaintiff below), for damages alleged to have been caused by the negligence of defendants to certain furniture, books, and other household effects which the plaintiff had entrusted to defendants for storage and safe-keeping.

The evidence tends to show that the goods in question were delivered to the defendants in good condition and remained in their possession for upwards of six (6) months; that they were afterwards loaded into a freight car by defendants and shipped to the plaintiff at Cleveland, Ohio; that they arrived at the latter place in a badly damaged condition; that the car into which the goods were placed for shipment, was suitable for that purpose, the roof and sides being in good condition, and the inside of the car being free from dampness both at the time of its departure from Chicago and upon arrival at its destination.

There was also some testimony pro and con, with respect to the fitness of defendants' storage house as such, and the manner in which it was conducted while plaintiff's

WILLARD C. HOWE, Defendant, in Error,	
vs.	ERROR TO
CHARLES C. O'NEILL and JOHN J. O'NEILL, copartners doing business as AMERICAN WOMANS POWDER AND IMPORTED CO., Plaintiffs in Error.	MUNICIPAL COURT OF CHICAGO.

MR. CHIEF JUSTICE WOLFE DELIVERED THE OPINION OF THE COURT:

By this writ of error it is sought to reverse a judgment for $250.00 and costs, rendered in favor of defendant in error (plaintiff below), for damages alleged to have been caused by the negligence of defendant to deliver to plaintiff, soap, and other toilet articles, which the plaintiff had entrusted to defendant for shipment and safe-keeping.

The evidence tends to show that the shipment-tion were delivered to the defendants in good condition, and received in their possession for shipment on May (?) 1922; that they were afterwards loaded into a car kept cool by refrigerators and shipped to the plaintiff in Cleveland, Ohio; that they arrived at the place of destination in a totally damaged condition; that the car into which the shipment was loaded was not suitable for such purpose, the roof and sides being in good condition, and the inside of the car being free from dampness both at the time of its departure from Chicago and upon arrival at the destination.

There was also some testimony pro and con, with respect to the fitness of defendants' refrigerator cars, and the manner in which the shipment was loaded.

aforesaid property was in the possession of defendants.

In our opinion, the question whether or not the damage alleged resulted from any negligence on the part of the defendants, was properly submitted to the jury, who by their verdict found against the defendants. From a careful examination of the evidence we cannot say that such finding was clearly and manifestly against the weight of the evidence.

It is also urged by defendants that it was the duty of plaintiff to examine his property before it was shipped from Chicago, and to notify defendants of any damage thereto, in order to give them an opportunity to make necessary repairs or replacements.

The contract entered into between plaintiff and the defendants, contained the following provision:

> "In case of breakage or marring, we will repair same, if possible, and if not, we will replace it with new goods of same value."

It will be noted that this clause is not mandatory, but affords plaintiff a cumulative remedy, to be availed of or not, as he sees fit. (Cook v. Lantz, 116 Ill. App. 472; Kemp v. Freeman, 42 Ill. App. 300.) In our opinion, therefore, defendants' contention is without merit.

Finally it is contended that the damages are excessive.

The maximum amount of damage sustained by plaintiff, as shown by the evidence, is $360, the reasonable cost of repairing the furniture. And while the record shows that certain other articles, including some 200 books, were more or less damaged, yet there is no evidence as to the actual amount. Such proof was indispensable.

On this state of the record, the judgment for $650 is clearly excessive. Therefore, if the plaintiff

aforesaid property was in the possession of defendants.

In our opinion, the question whether or not the damage alleged resulted from any negligence on the part of the defendants, was properly submitted to the jury, who by their verdict found against the defendants. From a careful examination of the evidence we cannot say that such finding was clearly and manifestly against the weight of the evidence.

It is also urged by defendants that it was the duty of plaintiff to examine his property before it was shipped from Chicago, and to notify defendants of any damage thereto, in order to give them an opportunity to make necessary repairs or replacements.

The contract entered into between plaintiff and the defendants, contained the following provision:

> "In case of breakage or warping, we will repair same, if possible, and if not, we will replace it with new goods of same value."

It will be noted that this clause is not mandatory, but affords plaintiff a cumulative remedy, to be availed of or not, as he sees fit. (Cook v. Lewis, 112 Ill. App. 472; Lamb v. Freeman, 42 Ill. App. 600.) In our opinion, therefore, defendants' contention is without merit.

Finally it is contended that the damages are excessive.

The maximum amount of damage sustained by plaintiff, as shown by the evidence, is $800, the reasonable cost of repairing the furniture. And while the record shows that certain other articles, including some 200 books, were more or less damaged, yet there is no evidence as to the actual amount. Such proof was indispensable.

On this state of the record, the judgment for $850 is clearly excessive. Therefore, if the plaintiff

will consent to a remittitur of $290 within ten days from the filing of this opinion, the judgment will be affirmed for the sum of $360, otherwise it will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR.

will consent to a remittitur of $200 within ten days from the filing of this opinion, the judgment will be affirmed for the sum of $800, otherwise it will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR.

166 - 22117

ANTONIO MENNELLA, for use of Joe Mennella, Defendant in Error,	ERROR TO
vs.	MUNICIPAL COURT OF CHICAGO.
MICHAEL BOTTIGLIERO, Plaintiff in Error.	

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Two trials have been had upon the single issue involved in this case, viz., Was the defendant indebted to the plaintiff?; both resulting in a finding that he was so indebted.

But two questions are presented for our determination on this writ of error; first, Is there any evidence in the record upon which to base an instruction on the question of fraud?; and second, Is the verdict of the jury supported by the evidence?

We find from a careful examination of the record, that there is sufficient evidence therein to fully support both the instruction complained of and the verdict of the jury. The judgment will therefore be affirmed.

AFFIRMED.

166 - 22117

ANTONIO MANNELLA, for use of Joe Mannella,
Defendant in error,

vs.

MICHAEL BOTTIGLIERO,
Plaintiff in error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MCDONALD DELIVERED THE OPINION OF THE COURT.

Two trials have been had upon the single issue involved in this case, viz., Was the defendant indebted to the plaintiff? both resulting in a finding that he was so indebted.

But two questions are presented for our determination on this writ of error: First, Is there any evidence in the record upon which to base an instruction on the question of fraud? and second, Is the verdict of the jury supported by the evidence?

We find from a careful examination of the record, that there is sufficient evidence therein to fully support both the instructions complained of and the verdict of the jury. The judgment will therefore be affirmed.

AFFIRMED.

181 - 22133

L. N. LaBOUY and JACOB WERSCHING, partners doing business as LaBouy & Wersching, Defendants in Error,	ERROR TO
vs.	MUNICIPAL COURT OF CHICAGO.
AUGUST MARTEN and MARIE MARTEN, his wife, Plaintiffs in Error.	

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This action was brought by defendants in error who are real estate brokers, to recover commissions alleged to be due from plaintiffs in error, arising out of a certain real estate transaction. The trial resulted in a judgment for the plaintiffs.

The deal in question was not consummated, for the reason that the defendants refused to carry out the alleged contract of sale made on their behalf by the plaintiffs with the prospective purchaser. By the terms of the proposed contract of sale, the purchased price was fixed at $3150, of which $1500 was to have been paid immediately, and the balance in deferred payments, evidenced by notes secured by a mortgage on the premises.

A number of questions are presented for review by this writ of error, only one of which, however, we deem it necessary to consider, viz., Did plaintiffs produce a purchaser who was ready, able and willing to buy the property on the terms offered?

Plaintiffs called as their witness the proposed purchaser, who testified that he was ready, able and willing to carry out the contract of purchase, "provided he could

181 - 22122

L. H. LEBOUY and JACOB WERSCHING, partners doing business as LeBouy & Wersching, Defendants in Error,	ERROR TO MUNICIPAL COURT OF CHICAGO.
vs.	
AUGUST MARTEN and MARIE MARTEN, his wife, Plaintiffs in Error.	

MR. JUSTICE MCDONALD DELIVERED THE OPINION OF THE COURT.

This action was brought by defendants in error who are real estate brokers, to recover commissions alleged to be due from plaintiffs in error, arising out of a certain real estate transaction. The trial resulted in a judgment for the plaintiffs.

The deal in question was not consummated, for the reason that the defendants refused to carry out the alleged contract of sale made on their behalf by the plaintiffs with the prospective purchaser. By the terms of the proposed contract of sale, the purchased price was fixed at $3150, of which $1500 was to have been paid immediately, and the balance in deferred payments, evidenced by notes secured by a mortgage on the premises.

A number of questions are presented for review by this writ of error, only one of which, however, we deem it necessary to consider, viz., did plaintiffs produce a purchaser who was ready, able and willing to buy the property on the terms offered?

Plaintiffs called as their witness the proposed purchaser, who testified that he was ready, able and willing to carry out the contract of purchase, "provided he could

get the money ($1500) from his father-in-law to make the first payment." This evidence falls far short of establishing the fact that he himself was ready and able to perform the contract on his part; nor was there any evidence in any way tending to show that the father-in-law was either able or willing to advance the $1500 required by the contract.

On this state of the record, it is obvious that the plaintiffs have failed to prove by the evidence that they procured a purchaser who was ready, able and willing to purchase the property on the terms proposed. The judgment must therefore be reversed.

REVERSED.

get the money ($1500) from his father-in-law to make the first payment." This evidence falls far short of establishing the fact that he himself was ready and able to perform the contract on his part; nor was there any evidence in any way tending to show that the father-in-law was either able or willing to advance the $1500 required by the contract.

On this state of the record, it is obvious that the plaintiffs have failed to prove by the evidence that they procured a purchaser who was ready, able and willing to purchase the property on the terms proposed. The judgment must therefore be reversed.

REVERSED.

199 - 22151

MAX COHN et al.,
Defendants in Error,

vs.

MORRIS COHEN,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

204 I.A. 405

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Defendants in error recovered a judgment for $40 and costs against plaintiff in error, for services rendered the latter in moving his furniture.

Defendant's affidavit of merits charged the plaintiff with negligence in moving and handling his piano, resulting in damage thereto, to the extent of $40, and alleged that the plaintiffs and he had mutually agreed to release and discharge each other from all claims and demands arising out of the transaction in question.

Plaintiffs offered no evidence whatsoever in support of their claim; while on behalf of the defendant there is the testimony of three witnesses besides that of the defendant himself, whose uncontradicted evidence clearly established the making of the aforesaid settlement agreement, and which also tends to prove that the piano in question was damaged to the extent claimed, as a result of plaintiffs' negligence.

In view of the foregoing undisputed evidence on behalf of the defendant, the court clearly erred in entering judgment for plaintiffs.

The point is made by plaintiffs that there was no consideration to support the alleged settlement agreement. It is a sufficient answer thereto to state that a promise for

109 - 22181

M.L COOK et al.,
Defendants in Error,

vs.

MORRIS COOK,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

204 I.A. 405

MR. JUSTICE McCONLOGUE DELIVERED THE OPINION OF THE COURT.

Defendants in error recovered a judgment for $40 and costs against plaintiff in error, for services rendered the latter in moving his furniture.

Defendant's affidavit of merits charged the plaintiff with negligence in moving and handling his piano, resulting in damage thereto, to the extent of $40, and alleged that the plaintiff and he had mutually agreed to release and discharge each other from all claims and demands arising out of the transaction in question.

Plaintiff offered no evidence whatsoever in support of that claim; while on behalf of the defendant there is the testimony of three witnesses besides that of the defendant himself, whose uncontradicted evidence clearly established the making of the mutual settlement agreement, and which also tends to prove that the piano in question was damaged to the extent claimed, as a result of plaintiff's negligence.

In view of the foregoing undisputed evidence on behalf of the defendant, the court clearly erred in entering judgment for plaintiffs.

The point is made by plaintiffs that there was no consideration to support the alleged settlement agreement. It is a sufficient answer thereto to state that a promise for

a promise, - as was the situation here - constitutes a valuable consideration. Pool v. Docker, 92 Ill. 501.

For the reasons hereinabove assigned, the judgment will be reversed.

REVERSED.

a promise, - as was the situation here - constitutes a valuable consideration. Pool v. Hooker, 92 Ill. 501.

For the reasons hereinabove assigned, the judgment will be reversed.

REVERSED.

23025

WASHINGTONIAN HOME OF CHICAGO, a corporation, Appellee,	INTERLOCUTORY ORDER.
vs.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
CITY OF CHICAGO, Appellant.	

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order of injunction issued against appellant, the City of Chicago (defendant below), upon complaint of the Washington Home of Chicago, a corporation.

The bill of complaint, after setting forth that the said Washington Home is a charitable institution created by legislative enactment, having for its object the care, cure and reclamation of inebriates, alleges that for many years last past it has been conducting an institution for such purpose, located at the southeast corner of Ogden avenue and Madison street in the city of Chicago; that said institution owns a certain tract of land at said location, upon which it erected a four-story building in the year 1875; that all its property and effects were acquired by way of gift, grant, devise, bequest or in payment for the care, cure and reclamation of inebriate patients, or from the rent, interest, income or increase on such property and effects, and the investment and re-investment thereof; that $31,576 was bequeathed to it by virtue and under the provisions of the last will and testament and codicil thereto, of Jonathan

23023

WASHINGTON HOME OF CHICAGO, a corporation,	Appellee,	INTERLOCUTORY ORDER.
va.		APPEAL FROM
		SUPERIOR COURT,
CITY OF CHICAGO,	Appellant.	COOK COUNTY.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order of injunction issued against appellant, the City of Chicago (defendant below), upon complaint of the Washington Home of Chicago, a corporation.

The bill of complaint, after setting forth that the said Washington Home is a charitable institution created by legislative enactment, having for its object the care, cure and reclamation of inebriates, alleges that for many years last past it has been conducting an institution for such purpose, located at the northeast corner of Ogden avenue and Madison street in the city of Chicago; that said institution owns a certain tract of land at said location, upon which it erected a four-story building in the year 1875; that all its property and effects were acquired by way of gift, grant, devise, bequest or in payment for the care, cure and reclamation of inebriate patients, or from the rent, interest, income or increase on such property and effects, and the investment and re-investment thereof; that $31,376 was bequeathed to it by virtue and under the provisions of the last will and testament and codicil thereto, of Jonathan

Burr, deceased, who died about February 4, 1869.

The bill then avers that there is now and since July 22, 1912 has been in full force and effect in the city of Chicago, a certain ordinance which provides inter alia for the installation in non-fireproof buildings more than two stories in height, of an inside stand-pipe and automatic sprinkler system, and prescribes a penalty for the non-compliance by anyone amenable thereto; that although complainant's building comes within the provisions of said ordinance, it has not complied therewith on the ground that the said ordinance was, for divers reasons, null and void.

The bill then sets forth that defendant has threatened to harass complainant with various proceedings at law, in an endeavor to compel the installation of the prescribed equipment; that an action of debt for the recovery of the $200 fine fixed by the said ordinance as a penalty for the noncompliance therewith, was brought and is now pending against complainant in the municipal court of Chicago; and that defendant threatens also to close the said premises unless complainant complies with the said ordinance.

Then follows the recital that a compliance with the said ordinance would entail an expenditure upwards of $7,000, requiring complainant to use not only part of the income of the said Burr trust fund but also a portion of other funds which complainant has invested and from which it derives an income; that complainant is uncertain as to whether it has the right, power or authority to use any part of the income from the said Burr trust fund for such an expenditure, and seeks the aid, advice, instruction and direction of the court with respect thereto.

The bill also sets forth that for want of modern

Burr, deceased, who died about February 4, 1889.

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The bill also sets forth that for want of adequa

conveniences, the said building, though in good repair, is rapidly becoming unsuited for the purpose to which it is being put, and that within the next five or six years complainant will be compelled to tear down the said building and replace it with a modern structure; that the directors of the said institution already have this matter in contemplation.

Complainant also avers that if defendant carries out its threat to prevent complainant from further using the said building because of its noncompliance with the said ordinance and prosecutes the suit now pending or commences others, complainant will suffer irreparable injury, because the damages incident thereto will be unascertainable, and because of the further fact that defendant, in executing the said ordinance will act through insolvent agents, officials or employees.

No answer having been filed by defendant, apparently the court in entering the said order, acted solely upon the recitals contained in the verified bill of complaint.

By the said order, defendant was restrained and enjoined from the further prosecution of the suit then pending, and from taking any other action against complainant because of its noncompliance with the said ordinance; and from interfering with its possession, occupancy, enjoyment and use of its said building, until the further order of court.

It is conceded that the validity of the said ordinance may be properly determined in the pending action at law. Complainant maintains, however, that its right to equitable relief rests upon other grounds, viz.; that it is seeking a construction of the Burr will and codicil, with respect to the use of the said trust fund, in order to

convenience, the said building, though in good repair, is rapidly becoming unsuited for the purpose to which it is being put, and that within the next five or six years complainant will be compelled to tear down the said building and replace it with a modern structure; that the directors of the said institution already have this matter in contemplation.

Complainant also avers that if defendant carries out its threat to prevent complainant from further using the said building because of its noncompliance with the said ordinance and prosecutes the suit now pending or commences others, complainant will suffer irreparable injury, because the damages incident thereto will be unascertainable, and because of the further fact that complainant, in executing the said ordinance will act through its duly sworn agents, officials or employees.

No answer having been filed by defendant, upon motion the court in entering the order noted solely upon the verbal complaint in the verified bill of complaint.

By the said order, defendant was restrained and enjoined from the further prosecution of the suit then pending, and from taking any other action against complainant because of its noncompliance with the said ordinance; and from interfering with its possession, occupancy, enjoyment and use of its said building, until the final order of court.

It is conceded that the validity of the said ordinance may be properly determined in the pending action at law. Complainant maintains, however, that its right to equitable relief rests upon other grounds, viz.: that it is seeking a construction of the Zurr will and codicil, [illegible]

determine whether or not it permits of the foregoing expenditure; and further, that it will suffer irreparable injury if the said ordinance is enforced against it.

It will be noted that complainant is the owner of the building and premises hereinabove set forth which, in the absence of any allegation to the contrary, we must assume is unincumbered; and that complainant has funds in addition to the said Burr fund, although their amounts and nature are not set forth in the bill, save to recite that complainant derives an income therefrom. No reason is assigned why such other funds are not available for the aforesaid disbursement, nor does it appear that complainant is prohibited from incumbering the said premises for the purpose of raising funds. The allegation that complainant contemplates the erection of a new building within a few years would also tend to show that complainant must have available means of raising money, and no reason is indicated why such means cannot now be resorted to for the purpose of installing the prescribed equipment.

The foregoing recitals in the bill of complaint do not comport with complainant's contention here that, save for the said Burr fund, it is without available means with which to install the prescribed equipment, and is reconcilable only with the theory that complainant is seeking to evade a compliance with the said ordinance.

The bill of complaint contains only a general allegation of irreparable injury. This, our Supreme Court has held, is insufficient; the bill should recite facts and circumstances from which it clearly appears that irreparable injury will follow if the said fire ordinance is enforced. (Power v. Village of Des Plaines, 123 Ill. Ill; C. B. & Q. R. R. Co. v. City of Ottawa, 148 Ill. 397.) The averment

determine whether or not it arises of the foregoing expenditure; and further, that it will suffer irreparable injury if the said ordinance is enforced against it.

It will be noted that complainant is the owner of the building and premises described in the form which, in the absence of any allegation to the contrary, we must assume is unincumbered; and that the building has funds in addition to the said land and income, although their amounts and nature are not set forth in the bill. Have we reason to conclude that complainant derives an income therefrom. No reason is assigned why these other funds are not available for the alleged disbursement, nor does it appear that complainant is prohibited from borrowing the required premises for the purpose of raising funds. The allegation of a complainant contemplates the erection of a building within a few years would also tend to show that complainant has now available means of a large kind, but no reason is given for why such funds cannot be resorted to for the purpose of instalting the prescribed equipment.

The fact that complainant is willing to comply so not compact with general municipal conditions here that, save for the said bare fund, it is willing to by legal means with zeal to install the prescribed equipment, shows it concerned only with the theory that a court should intervene to avoid a compliance with the said ordinance.

The fact of complaint that the only [illegible] allegation of irreparable injury [illegible], nor [illegible] it has not, in insufficient; [illegible] circumstances [illegible] injury will follow if the said fire ordinance is enforced. (Dover v. City of Des Plaines, [illegible] Ill. [illegible]; [illegible] v. [illegible] v. City of Ottawa, 149 Ill. [illegible]). The [illegible]

that defendant has threatened and continues to threaten to close complainant's institution if the said ordinance is not complied with, does not ipso facto imply irretrievable damage. Whether the said ordinance be valid or void, it is obvious that the municipality in passing it, had for its object the safety of the public in the event of conflagration.

In our opinion, the verified bill of complaint fails to allege such a state of facts as would warrant the intervention of a court of chancery, by way of injunction.

In this view of the case, it becomes unnecessary to construe the said Burr will and codicil for the purpose of determining the latitude allowed the trustees in making expenditures thereunder.

For the reasons hereinabove assigned, the decree will be reversed.

REVERSED.

that defendant has threatened and continues to threaten to close complainant's institution if the said ordinance is not complied with, does not ipso facto imply irreparable damage. Whether the said ordinance be valid or void, it is obvious that the municipality in passing it, had for its object the safety of the public in the event of conflagration.

In our opinion, the verified bill of complaint fails to allege such a state of facts as would warrant the intervention of a court of chancery, by way of injunction.

In this view of the case, it becomes unnecessary to construe the said duly will and codicil for the purpose of determining the latitude allowed the trustee in making expenditures thereunder.

For the reasons hereinabove assigned, the decree will be reversed.

REVERSED.

14 - 21549

ESTELLE BLOOMER,
Plaintiff in Error,

vs.

LOUIS H. VERRICK and ANTON J. CERMAK, Bailiff, etc.,
Defendants in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

204 I.A. 408

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This was an action for "Trial of right of property" under the statute. Plaintiff claimed to be the owner of certain personal property which had been levied upon by defendant, Anton J. Cermak, as bailiff of the Municipal Court of Chicago, by virtue of a certain writ of execution issued by said court in another certain cause there pending wherein defendant Louis H. Verrick was plaintiff, and Mathew Bloomer was defendant. There was a finding and judgment in favor of defendants. This writ of error is brought to review the correctness of such judgment. The sole question involved is that of the right to the property in question.

The evidence offered by defendants tended to show that the property levied on was the co-partnership property of the claimant and her husband, the judgment debtor. We think the evidence tended to establish that theory, and hence justified the court's finding against the claimant. Such finding however does not determine that the property belongs to the defendant in the execution. (Cassell v. Williams, 12 Ill. 386.) While claimant's counsel argues that co-partnership property cannot be taken to satisfy a judgment against one of the partners, and that seems to be the law in this state (Gerard v. Bates, 124 Ill. 150) yet the only question

MATTHEW BLOOMER, Plaintiff in Error,	
vs.	ERROR TO
LOUIS H. VERRICK and ANTON J. GUTMAN, Bailiff, etc., Defendants in Error.	MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE GOODWIN DELIVERED THE OPINION OF THE COURT.

This was an action for "Trial of right of property" under the statute. Plaintiff claimed to be the owner of certain personal property which had been levied upon by defendant, Anton J. Gutman, as Bailiff of the Municipal Court of Chicago, by virtue of a certain writ of execution issued by said court in another certain cause there pending wherein defendant Louis H. Verrick was plaintiff, and Matthew Bloomer was defendant. There was a finding and judgment in favor of defendants. This writ of error is brought to review the correctness of such judgment. The sole question involved is that of the right to the property in question.

The evidence offered by defendants tended to show that the property levied on was the co-partnership property of the claimant and her husband, the judgment debtor. We think the evidence tended to establish that theory, and hence justified the court's finding against the claimant. Such finding however does not determine that the property belongs to the defendant in the execution. (Hessel v. Williams, 12 Ill. 386.) While claimant's counsel argue that co-partnership property cannot be taken to satisfy a judgment against one of the partners, and that seems to be the law in this state (Garard v. Paton, 124 Ill. 180) yet the only question

for decision here is whether the evidence sustained the right of property in claimant alone. As it did not, the judgment against her must be affirmed.

AFFIRMED.

for decision here is whether the evidence sustained the right of property in claimant alone. As it did not, the judgment against her must be affirmed.

AFFIRMED.

455 - 21853

JOHN M. GLENN, Appellant,	)	APPEAL FROM
vs.	)	SUPERIOR COURT,
	)	COOK COUNTY.
ANDREW M. LAWRENCE and ROY D. KEEHN, Appellees.	)	204 I.A. 411

STATEMENT OF FACTS. This was an action on the case for malicious prosecution brought by John M. Glenn against Andrew M. Lawrence and Roy D. Keehn. At the close of the plaintiff's evidence the court directed a verdict, and entered judgment thereon, in favor of defendants and against plaintiff for costs of suit. This appeal is brought to review the correctness of said judgment.

On Feb. 14, 1913 the Illinois State Senate passed a certain resolution providing that a committee, to consist of the President and four members of that body, be appointed for the purpose of investigating the subject of white slave traffic in Illinois. Barratt O'Hara, who was then Lieutenant Governor of Illinois, and ex-officio president of the State Senate, became, in accordance with the provisions of said resolution, chairman of said committee.

On March 6, 1913, (during the progress of said investigation) there appeared in the Manufacturer's News, a certain weekly newspaper published in Chicago, and owned by plaintiff, an article concerning Anirew M. Lawrence and Barratt O'Hara, and which, in part, is as follows:

> "Lieutenant-Governor Barratt O'Hara, chairman of the so-called 'white slave commission' was for a number of years, connected with the Chicago Examiner. He now enjoys the fullest confidence of Andrew Lawrence, representative of the Hearst papers in Chicago. It is our judgment that this investigation would not be nearly

JOHN M. GLENN,
Appellant,

vs.

ANDREW M. LAWRENCE and
ROY D. KEHM,
Appellees.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

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On Feb. 14, 1913 the Illinois State Senate passed a certain resolution providing that a committee, to consist of the President and four members of that body, be appointed for the purpose of investigating the subject of white slave traffic in Illinois. Barrett O'Hara, who was then Lieutenant Governor of Illinois, and ex-officio president of the State Senate, became, in accordance with the provisions of said resolution, chairman of said committee.

On March 6, 1913, (during the progress of said investigation) there appeared in the Westchester's News, a certain weekly newspaper published in Chicago, and owned by plaintiff, an article concerning Andrew M. Lawrence and Barrett O'Hara, and which, in part, is as follows:

"Lieutenant-Governor Barrett O'Hara, chairman of the so-called 'white slave commission' was for a number of years, connected with the Chicago Examiner. He now enjoys the highest confidence of Andrew Lawrence, representative of the Hearst papers in Chicago. It is now declared that this investigation would not be nearly

so vigorous if the State street merchants would furnish the Hearst papers with a sufficient amount of full-page advertising to satisfy the greed of Mr. Lawrence.

Under the pretext that a woman must become a prostitute unless she receives $12 a week in wages at whatever employment she is following, the Illinois State Senate has started out to create sufficient public sentiment to pass a minimum wage law. The movement is backed by a number of reform organizations and apparently has the endorsement of the state administration."

On March 13, 1913, there appeared in the same publication another article which, inter alia, contained the following:

"When the owner of Manufacturers' News was suddenly brought before the senate vice-commission in Chicago last Saturday and questioned as to the foundations for his statement as to the connection between Lieutenant-Governor O'Hara and Andrew Lawrence, the representative of the Hearst papers in Chicago, thirty or forty newspaper men and 200 or so spectators were present. * * *

During the examination, Lieutenant-Governor O'Hara was repeatedly prompted by M. B. Coan, who was immediately behind him and part of the time stood up so he could better say to Mr. O'Hara what he desired. Every person in the room had as good an opportunity to observe what was taking place between Mr. O'Hara and Mr. Coan as the witness. Many of the members of the General Assembly and many of the newspaper men present know Mr. Coan personally and know whether he has relations with Andrew Lawrence and the Hearst papers or not.

We should like to inquire if there is a member of the commission or a newspaper man who is familiar with conditions around Chicago and over the state who will for one moment contend that Mr. Coan is not the personal representative of Andrew Lawrence? Does not every newspaper in Chicago know Mr. Coan reports to Mr. Lawrence? Is it necessary for Mr. O'Hara and Mr. Lawrence to see each other every day? There are other means of communication.

We should like to ask Lieutenant-Governor Barratt O'Hara whether any of the employes of the commission have been or are now the employes of Mr. Lawrence or the Hearst papers? We will ask Mr. Barrett O'Hara if certain patronage was not distributed by the commission in order that Mr. Andrew Lawrence might have consideration, and to give him an opportunity to keep in close touch with the inner workings of the commission? We should like to ask Mr. Barratt O'Hara if these influences do not dictate the witnesses who appear before the commission?"

On the day succeeding the second publication, Andrew M. Lawrence appeared before Hon. Thomas F. Scully, then sitting as one of the Judges of the Municipal Court of Chicago, and there subscribed and swore to a criminal complaint against John M. Glenn and Glenn & Co., a corporation, which complaint

so vigorous if the State street merchants would furnish the Hearst papers with a sufficient amount of full-page advertising to satisfy the greed of Mr. Lawrence.

Under the pretext that a woman must become a prostitute unless she receives $12 a week in wages at whatever employment she is following, the Illinois State Senate has started out to create sufficient public sentiment to pass a minimum wage law. The movement is backed by a number of reform organizations and apparently has the endorsement of the state administration."

On March 12, 1913, there appeared in the same publication another article under, *Inter alia*, containing the following:

"When the owner of Manufacturers' Cafe was suddenly brought before the senate vice-commission in Chicago last Saturday and questioned as to the foundation for his statement as to the connection between Lieutenant-Governor O'Hara and Andrew Lawrence, the representative of the Hearst papers in Chicago, Sheriff of Cook County men and 200 or so spectators were present. * * *

During the examination, Lieutenant-Governor O'Hara was repeatedly prompted by a. H. Chase, who was immediately behind him and part of the time stood up so he could better say to Mr. O'Hara what he desired. Every person in the room had an good an opportunity to observe what was taking place between Mr. O'Hara and Mr. Chase as the witness. Many of the members of the Central Association and many of the newspaper men present know Mr. Chase personally and know whether he has relations with Andrew Lawrence and the Hearst papers or not.

We should like to inquire if there is a member of the commission or a newspaper man who is familiar with conditions around Chicago and over the state who will for one moment contend that Mr. Chase is not the personal representative of Andrew Lawrence. Does not every newspaper in Chicago know Mr. Chase reports to Mr. Lawrence if it is necessary for Mr. O'Hara and Mr. Lawrence to see each other every day? There is no other means of communication.

We should like to ask Lieutenant-Governor O'Hara whether any of the employes of the committee have been or are now the employes of Mr. Lawrence or the Hearst papers? We will ask Mr. Barnes, Mr. Lawrence's partisan entourage who not distributed by the commission in order that Mr. Andrew Lawrence might have consultation, and to give him an opportunity to keep in close touch with the inner workings of the commission. We should like to ask Mr. Barnes if those influences do not dictate the witnesses who appear before the commission?"

On the day succeeding the second publication, namely, March [illegible], Lawrence appeared before the senate. Thereon [illegible], when cited as one of the judges of the municipal court of Chicago, and there subscribed and swore to a criminal complaint against John M. Olson and Olson & Co., a corporation, a libel complaint

set forth the publication of March 6, 1913, and alleged that said publication was a malicious and defamatory libel against Andrew M. Lawrence and Barratt O'Hara. Judge Scully thereupon endorsed on said complaint the following:

> "I have examined the within information and the informant, and am satisfied that there is probable cause for filing the same. Leave is hereby granted to file it and it is ordered that an instanter capias issue against the defendant. Bail fixed at $2,000.
>
> Thomas F. Scully,
> Judge of the Municipal Court of Chicago."

Pursuant to such direction a capias was forthwith issued and served on plaintiff, who, by virtue thereof, was taken to police headquarters and then to the Municipal Court, where he was admitted to bail. On April 2, 1913 the Municipal Court, upon motion of plaintiff's counsel for a rule on the People etc. to file an information in lieu of a complaint, indicated that it would allow such motion. E. J. Raber, assistant State's attorney for Cook County, appeared in behalf of the prosecution and the evidence tends to show that Roy D. Keehn, who was present, appeared as attorney for Andrew M. Lawrence. Thereupon the following took place:

> "Mr. Keehn: As I understand, the court's holding, then is that you have jurisdiction of this to try?
> The Court: I shall treat the pleading on file as an information, with the suggestion of the state's attorney that he may amend as it might be defective on its face.
> Mr. Raber: Well, the state's attorney does not * * care to amend it. If the theory upon which this prosecution is brought is right, of course, we don't want to proceed as an information, because it is not an information.
> The Court: No, it is not now, but you can make it a good information. The court will treat it as an information.
> Mr. Raber: Then I will make a motion to dismiss it.
> Mr. Keehn: Whatever the proper motion is to get out of the court, without the court having jurisdiction to withdraw the -
> Mr. Wayman: You cannot get out of this court.
> Mr. Raber: I can make a motion to dismiss it.
> The Court: Do you make that as state's attorney?
> Mr. Raber: Yes.
> The Court: All right, The case is dismissed on motion of the state's attorney."

set forth the publication of March 6, 1912, and alleged that said publication was a malicious and defamatory libel against Andrew K. Lawrence and Barnett O'Hara. Judge Donlin thereupon endorsed on said complaint the following:

"I have examined the within information and the information, and am satisfied that there is probable cause for filing the same. Leave is hereby granted to file it and it is ordered that an instanter capias issue against the defendant. Bail fixed at $2,000.
Thomas E. Donlin,
Judge of the Municipal Court of Chicago."

Pursuant to such direction a capias was forthwith issued and served on plaintiff, who, by virtue thereof, was taken to police headquarters and then to the Municipal Court, where he was admitted to bail. On April 2, 1912 the Municipal Court, upon motion of plaintiff's counsel for a rule on the people etc. to file an information in lieu of a complaint, indicated that it would allow such motion. C. A. Baker, assistant state's attorney for Cook County, appeared in behalf of the prosecution and the evidence sought to show that Guy D. Keenn, who was present, appeared as attorney for Andrew K. Lawrence. Thereupon the following took place:

"Mr. Keenn: As I understand, the court's holding, then is that you have jurisdiction of this to try?
The Court: I shall treat this pleading on file as an information, with the suggestion of the state's attorney that he may amend as it might be defective on its face.
Mr. Baker: Well, the state's attorney does not * * care to amend it. If the theory upon which this prosecution is brought is right, of course, we don't want to proceed on an information, because it is not an information.
The Court: No, it is not now, but you can make it a good information. The court will treat it as an information.
Mr. Baker: Then I will make a motion to dismiss it.
Mr. Keenn: Whatever the proper motion is to get out of the court, without the court having jurisdiction to withdraw the -
Mr. Wyman: You cannot get out of this court.
Mr. Baker: I can make a motion to dismiss it.
The Court: Do you make that as state's attorney?
Mr. Baker: Yes.
The Court: All right. The case is dismissed on motion of the state's attorney."

The said order of dismissal was entered by the court, and plaintiff discharged. Plaintiff's evidence further tends to show that later, during the same day, assistant state's attorney Raber (accompanied by defendant Lawrence), appeared before the Criminal Court of Cook County, and presented another criminal complaint, prepared by him, based upon said publication or publications. Said complaint was subscribed and sworn to by Lawrence , and a capias directed to issue thereon against plaintiff, who, in response thereto, upon the following day, appeared in said court, waived service and was admitted to bail. The assistant state's attorney testified that he presented two complaints to the Criminal Court, the second based upon the publication of March 13, 1913, and that two warrants issued thereon, but the then presiding judge of said court testified that he did not think two complaints were presented. On May 1, 1913 Andrew M. Lawrence and Barratt O'Hara appeared and testified before the Grand Jury of Cook County in regard to the alleged libel, which body returned a "not a true bill", and subsequently, on May 16, 1913, upon motion of plaintiff's counsel, and with the consent of the assistant state's attorney, all proceedings pending in the Criminal Court against plaintiff were dismissed, and four days later the present action was commenced. The declaration consists of three counts. The first count charged defendants with conspiracy to maliciously prosecute and arrest plaintiff upon two charges based upon said publication, alleged not to be libelous. The second count charged malicious prosecution based on a charge of libel on the publication of March 6, 1913, and the third count charged malicious prosecution based on the publication of March 13, 1913. The ad damnum was laid at $50,000.

The said order of dismissal was entered by the court, and plaintiff discharged. Plaintiff's evidence further tends to show that later, during the same day, assistant state's attorney Baker (accompanied by Salomint Lawrence), appeared before the Criminal Court of Cook County, and presented another criminal complaint, prepared by him, based upon said publication or publications. Said complaint was subscribed and sworn to by Lawrence, and a capias directed to issue thereon against plaintiff, who, in response thereto, upon the following day, appeared in said court, waived service and was admitted to bail. The assistant state's attorney testified that he presented two complaints to the Criminal Court, the second based upon the publication of March 13, 1913, and that two warrants issued thereon, but the then presiding judge of said court testified that he did not think two complaints were presented. On May 1, 1913 [illegible] Lawrence and Barrett filed a [illegible] before the Grand Jury of Cook County in regard to the alleged libel, which body returned a "not a true bill", and on July, on May 16, 1913, upon motion of plaintiff's counsel, and with the consent of the assistant state's attorney, all proceedings pending in the criminal court against plaintiff were dismissed, and four days later the present action was commenced. The declaration consists of three counts. The first count charges defendants with conspiracy to maliciously prosecute and arrest plaintiff upon two criminal charges based upon said publication, alleged not to be libelous. The second count charges malicious prosecution [illegible] of libel on the publication of March 6, 1913, upon the third count charged malicious prosecution based on the publication of March 13, 1913. The ad damnum was laid at $50,000.

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

There is no evidence in this case tending to support the allegations in plaintiff's declaration as to defendant Roy B. Kechn. We shall therefore proceed to consider the questions presented in relation to Andrew M. Lawrence, the other defendant.

To maintain an action for malicious prosecution the plaintiff must show that the defendant acted from malicious motives in prosecuting him and that said defendant had no sufficient reason to believe him guilty. If either of these elements be wanting, the action must fail. The want of probable cause is the main ground of this action, and though negative in its character, must be proved by the plaintiff by some affirmative evidence. Brown v. Smith, 83 Ill. 291. While the law casts the burden of proof upon the plaintiff to prove a negative - to show clearly that defendant did not have probable cause to institute the criminal prosecution, - slight evidence will usually suffice for such purpose. Israel v. Brooks, 23 Ill. 575. In the instant case the court, at the close of plaintiff's evidence directed a verdict in favor of defendants. Was there any evidence tending to show that Andrew M. Lawrence did not have probable cause in instituting the criminal proceedings complained of? Probable cause which will relieve a prosecution from liability has been defined to be a belief by him in the guilt of the accused, based on circumstances sufficiently strong to evidence such belief in the mind of a reasonable and cautious man. Wilkerson v. McGhee, 153 Mo. App. 343. The evidence tends to show that the state's attorney causedhis assistant to examine the publication in question; that the latter reported the result of such examination to his superior; that

MR. JUSTICE MCGOOGHEY DELIVERED THE OPINION OF THE COURT.

There is no evidence in this case tending to support the allegations in plaintiff's declaration as to defendant Roy E. Keehn. We shall therefore proceed to consider the questions presented in relation to Andrew E. Lawrence, the other defendant.

To maintain an action for malicious prosecution the plaintiff must show that the defendant acted from malicious motives in prosecuting him and that said defendant had no sufficient reason to believe him guilty. If either of these elements be wanting, the action must fail. The want of probable cause is the main ground of this action, and though negative in its character, must be proved by the plaintiff by some affirmative evidence. Brown v. Smith, 55 Ill. 491. While the law casts the burden of proof upon the plaintiff to prove a negative - to show clearly that defendant did not have probable cause to institute the criminal prosecution, - slight evidence will usually suffice for such purpose. Israel v. Brooks, 23 Ill. 575. In the instant case the court, at the close of plaintiff's evidence directed a verdict in favor of defendants. There was evidence tending to show that Andrew E. Lawrence did not have probable cause in instituting the criminal proceedings complained of? Probable cause which will relieve a prosecutor from liability has been defined to be a belief by him in the guilt of the accused, based on circumstances sufficiently strong to warrant such belief in the mind of a reasonable and cautious man. Wilkerson v. Moshee, 183 Mo. App. 343. The evidence tends to show that the state's attorney examined magistrate to examine the publication in question; that the latter reported the result of such examination to his superior; that

thereafter a complaint, based on such publication or publications, sworn to by Andrew M. Lawrence, was filed in the Municipal Court, containing the following endorsement of the Judge to whom it was presented, "I have examined the within information, and am satisfied that there is probable cause for filing the same." It further appears that following the dismissal of said proceedings and during the same day, the assistant state's attorney prepared another complaint charging plaintiff with criminal libel, based on the same charges, and presented same to a judge of the Criminal Court, and subsequently presented the entire subject matter to the Grand Jury of Cook County for investigation. Such evidence does not tend in our opinion to show that Lawrence acted without probable cause. On the contrary we think it tends to show that defendant Lawrence in proceeding at each step practically under the direction, if not the advice, of the state's prosecuting officer, and after a judge had endorsed on his original complaint before ordering a capias that he was satisfied that there was probable cause, was governed by the views of the officers of the law entrusted with the administration of the criminal law as to the libelous character of said articles, as fully as if he had been advised by private counsel, and had reason to believe from their course and attitude after the matter was so submitted for their judgment, that the articles complained of were criminally libelous. Hence the evidence tended to show that he acted upon probable cause. The majority of this court express no opinion as to the alleged libelous character of said publication or publications. The question to be tried in this action was not whether the accused (plaintiff) was guilty of criminal libel, but whether the prosecutor (Lawrence) had reasonable grounds to believe and did actually believe that plaintiff was guilty. Anderson

thereafter a complaint, based on such publication or publications, sworn to by Andrew M. Lawrence, was filed in the Municipal Court, containing the following endorsement of the Judge to whom it was presented, "I have examined the within information, and am satisfied that there is probable cause for filing the same." It further appears that following the dismissal of said proceedings and during the same day, the assistant state's attorney prepared another complaint charging plaintiff with criminal libel, based on the same charges and presented same to a judge of the criminal Court, and subsequently presented the entire subject matter to the Grand Jury of Cook County for investigation. The evidence does not lead us to our opinion to show that defendants acted without probable cause. On the contrary we think it tends to show that defendant Lawrence in performing at the request, practically under the direction, if not the order, of the State's prosecuting officer, and after a judge had endorsed on the original complaint before us being a complaint he was satisfied that there was probable cause, [illegible] by the same of the officers of the law [illegible] the criminal prosecution of the criminal law as to the libel [illegible] said articles, namely, if an [illegible] by private counsel, and had reason to believe from their course and attitude after the matter was submitted for their [illegible], that the articles complained of were criminally libelous. When the evidence tended to show that he acted upon probable [illegible] the majority of this court express no opinion as to the [illegible] libelous character of said articles [illegible] the question to be tried in [illegible] with the accused (plaintiff) was guilty of criminal libel, but whether the prosecutor (Lawrence) had reason to be grounds to believe and did actually believe that plaintiff [illegible]

v. Friend, 71 Ill. 475; Shea v. Morand, 191 Ill. App. 11.

McElroy v. The Catholic Press Co., 254 Ill. 290, was an action for malicious prosecution. The trial court, at the close of plaintiff's evidence, directed a verdict in favor of defendant. The Supreme Court in affirming the action of the lower court said:

> "There have been a great many cases where it has been held, in substance, that a conviction by a tribunal constituted by law, although subsequently reversed, raises a presumption of probable cause and is sufficient proof that the prosecution was not groundless unless the presumption is overcome by proof that the conviction was procured by corruption, false testimony or other undue or unlawful means. (Citing many cases.) It is true, that when the judgment against the plaintiff was reversed and the cause remanded for a new trial, the judgment was set aside and the case stood just as though it never had been tried. The reversal settled the question that the accused was not properly convicted, that the facts proved, did not, in law constitute the crime of embezzlement, and that the plaintiff was, in fact, innocent of the crime laid to her charge, but the improper conviction arose from the mistaken view of the law by the trial court and it did not establish that there was no probable cause for believing her guilty. The error of the trial court is not chargeable to the defendant and the conviction continued to be evidence of probable cause for the prosecution. * * * It did not tend to prove a want of probable cause that Hubbard (agent of defendant) did not know the law better than the judge of the criminal court." (The italics are ours.)

It is also urged that defendants instigated and procured the dismissal of the proceedings in the Municipal Court; thereby tending to show bad faith and want of probable cause. While in other jurisdictions it has been held that the voluntary dismissal of a criminal prosecution is evidence of want of probable cause for instituting it, this court held otherwise in Gentzen v. H. M. Hooker Co., 173 Ill. App. 127. In that case there was no question raised, as here, as to the effect of a dismissal at the instance of the prosecuting witness but we do not think it distinguishable in principle from the instant case. We are of opinion that the evidence tending to show that the defendant, Keehn, acted in conjunction with the state's attorney in regard to such dismissal did not tend

v. Kriegel, 71 Ill. 475; Shea v. Morand, 191 Ill. App. 11. Koehler v. The Catholic Press Co., 284 Ill. 390, was an action for malicious prosecution. The trial court, at the close of plaintiff's evidence, directed a verdict in favor of defendant. The Supreme Court in affirming the action of the lower court said:

> "There have been a great many cases where it has been held, in substance, that a conviction by a tribunal constituted by law, although subsequently reversed, raises a presumption of probable cause and is sufficient proof that the prosecution was not groundless unless the presumption is overcome by proof that the conviction was procured by corruption, false testimony or other undue or unlawful means. (Citing many cases.) It is true, that when the judgment against the plaintiff was reversed and the cause remanded for a new trial, the judgment was set aside and the case stood just as though it never had been tried. The reversal restored the presumption that the accused was not properly convicted, that the facts proved, did not, in law constitute the crime of embezzlement, and that the plaintiff was, in fact, innocent of the crime in the charge, but the improper conviction arose from the mistaken view of the law by the trial court and it did not establish that there was no probable cause for bringing her guilty. The error of the trial court in the charge to the jury as to the defendant and the conviction constituted to be evidence of probable cause for the prosecution. * * * It had not been held to mean a want of probable cause that the defendant (agent of defendant) did not know the law further than was taken judgment of the tribunal court." (The italics are ours.)

It is also urged that defendants instigated and procured the dismissal of the proceedings in the municipal court; thereby tending to show bad faith and want of probable cause. While in other jurisdictions it has been held that the voluntary dismissal of a criminal prosecution is evidence of want of probable cause for instituting it, this court held otherwise in Gentzen v. H. L. Hooker Co., 172 Ill. App. 127. In that case there was no detention proof. So here, as to the effect of a dismissal at the instance of the prosecuting witness, but we do not think it distinguishable in principle from the instant case. We are of opinion that the evidence tending to show that the defendant, Brown, acted in conjunction with the state's attorney in regard to such dismissal did not tend

to prove want of probable cause as to either defendant, in view ofthe fact that a similar complaint was subsequently presented and filed in the criminal court on the same day.

It is further contended by plaintiff's counsel that the act of the Grand Jury in returning "Not a true bill" is prima facie evidence of want of probable cause. Cases cited by counsel in support of such contention also hold that a discharge of the accused by an examining magistrate, is prima facie evidence of want of probable cause. The obvious reason for such holding is that the duty of an examining magistrate is similar to that of a grand jury, viz., to determine the question whether there is probable cause for the prosecution. In Illinois the discharge of the accused by an examining magistrate is not prima facie evidence of want of probable cause. Israel v. Brooks, supra; Farmelee Co. v. Griffin, 136 Ill. App. 367. We are of the opinion that the doctrine announced in Israel v. Brooks, as to a discharge by an examining magistrate is analagous to the action of a grand jury in ignoring a bill of indictment. That the return of a "no bill" by a grand jury is not evidence of want of probable cause has been frequently held. Fulmer v. Harmon, 3 Strob. Law. Rep. (S. C.) 576; Apgar v. Woolston, 43 N. J. Law Rep. 57. The writer of the opinion in the latter case, after reviewing the American and English authorities on this question said:

> "I am aware that there are cases in the courts of this country, entitled to the greatest respect, in which it has been held that the failure of the grand jury to indict is prima facie evidence of the want of probable cause. But there are also decisions of the courts of our sister states, entitled to equal respect, holding the contrary; and I think the doctrine laid down by Starkie, Phillips and Greenleaf is founded on sound principles of law, and is consistent with public policy."

For the reasons herein stated, we are of opinion that there is no evidence tending to show want of probable

to prove want of probable cause as to either defendant. In view of this fact that a similar complaint was subsequently presented and filed in the criminal court on the same day.

It is further contended by plaintiff's counsel that the act of the Grand Jury in returning "not a true bill" is prima facie evidence of want of probable cause. Cases cited by counsel in support of such contention also hold that a discharge of the accused by an examining magistrate, is prima facie evidence of want of probable cause. The obvious reason for such holding is that the duty of an examining magistrate is similar to that of a grand jury, viz., to determine the question whether there is probable cause for the prosecution. In fulfilling the ends of the proposed by an examining magistrate is not prima facie evidence of want of probable cause. Lessel v. Cooke, supra; Greenslade Co. v. Hall, [illegible] 1. c. 477. [illegible] of the opinion that the doctrine announced in Lessel v. Brooks, as to a discharge by an examining magistrate is contrary to the action of a grand jury in bringing a bill of indictment. That the return of a "no bill" by a grand jury is not evidence of want of probable cause [illegible] Fraternal Bank Rulmon v. Lemon, [illegible] 1. c. 1.) 477; Cooke v. Cooksion, 12 [illegible] L. Law Rep. [illegible] In the matter of the relation in the Investigation [illegible] after [illegible] the English authorities on this question with:

> "I am aware that there are cases in the courts of this country, relating to the previous inquest, in which it has been held that the failure of the grand jury to indict is prima facie evidence of the want of probable cause. But there are also decisions to the effect of our statutes, entitled to equal respect, holding the contrary; and I think the [illegible] Tucker, Phillips and Greenleaf in favor on every principles of law, and in consistent with [illegible] office."

For the reasons herein stated, [illegible] of opinion that there is no evidence tending to show want of probable

cause, and that the court did not err in directing a verdict in favor of defendants. The judgment of the Superior Court will therefore be affirmed.

AFFIRMED.

MR. JUSTICE McDONALD CONCURRING SPECIALLY:

I concur in the conclusions reached and the reasoning set forth in the foregoing opinion, but am of the further opinion that the article in question is libelous *per se*.

cause, and that the court did not err in directing a verdict in favor of defendants. The judgment of the superior court will therefore be affirmed.

AFFIRMED.

MR. JUSTICE MCDONALD CONCURRING SPECIALLY:

I concur in the conclusions reached and the reasoning set forth in the foregoing opinion, but am of the further opinion that the article in question is libelous per se.

628 - 22026

MARY HOFFMAN, a minor by Apolonia Hoffman, her next friend,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY, a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

204 I.A. 414

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

In this case plaintiff recovered a judgment against defendant for $1500 as damages for injuries received by her while walking across a public highway by being struck by a street car owned and operated by defendant. Defendant contends that, (1) the verdict is against the manifest weight of the evidence, (2) the court erred in its instructions to the jury, and (3) the damages are excessive. At the time of the said occurrence, plaintiff was about eight years old.

The jury was in a better position than this court to determine from the age, intelligence and experience of the plaintiff, together with the other facts and circumstances in evidence, whether she was in the exercise of ordinary care, and whether defendant's servants in the operation of the car were negligent at and before the time in question. We are unable to say that the verdict is against the manifest weight of the evidence.

Defendant contends that the court erred in giving the following instruction:

> "If from the evidence of the case and under the instructions of the court the jury shall find the issue for the plaintiff, and that the plaintiff has sustained damages as charged in the declaration then, to enable the jury to estimate the amount of such damages it is

MARY HOFFMAN, a minor by Apolonia Hoffman, her next friend, Appellee,	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
va.	
CHICAGO RAILWAYS COMPANY, a corporation, Appellant.	

MR. JUSTICE McDONNEY DELIVERED THE OPINION OF THE COURT.

In this case plaintiff recovered a judgment against defendant for $1000 as damages for injuries received by her while walking across a public highway by being struck by a street car owned and operated by defendant. Defendant contends that, (1) the verdict is against the manifest weight of the evidence, (2) the court erred in its instructions to the jury, and (3) the damages are excessive. At the time of the said occurrence, plaintiff was about eight years old.

The jury was in a better position than this court to determine from the age, intelligence and experience of the plaintiff, together with the other facts and circumstances in evidence, whether she was in the exercise of ordinary care, and whether defendant's servants in the operation of the car were negligent at and before the time in question. We are unable to say that the verdict is against the manifest weight of the evidence.

Defendant contends that the court erred in giving the following instruction:

"If from the evidence of the case and under the instructions of the court the jury shall find the issue for the plaintiff, and that the plaintiff has sustained damages as charged in the declaration then, to enable the jury to estimate the amount of such damages it is

> not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jury may themselves make such estimate from the facts and circumstances in proof, and by considering them in connection with their knowledge, observation and experience in the business affairs of life."

Said instruction is objected to because it refers to plaintiff's declaration wherein it is alleged that the injuries complained of will for the rest of her life, disable plaintiff from attending to her affairs and business.

A similar instruction in a case brought by an adult was approved in North Chicago Street R. R. Co. v. Fitzgibbons, 180 Ill. 466, wherein the declaration contained an allegation (not set forth in said opinion) that plaintiff, because of the injuries complained of, was "hindered and prevented from transacting her business affairs."

In the instant case there was no attempt to establish a basis for damages except for suffering. It was admitted by plaintiff's attending physician that there was no permanent injury. It seems improbable in this state of the record that the jury were led to consider anything other than pain and suffering endured by plaintiff, and the amount of the verdict does not indicate that they did. We cannot assume that the jury acted upon the theory that there was a permanent injury, and no such inference can be legitimately drawn from the evidence. We do not think, therefore, that the giving of such instruction was reversible error.

The injury complained of was a fracture of the neck of the right humerus. The evidence tended to show a union of the fragments of bone at point of fracture, and at the time of the trial, (nearly three years following the date of the injury) some limitation of motion. We do not think the verdict excessive. The judgment of the Superior Court should be affirmed.

AFFIRMED.

> not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jury may themselves make such estimate from the facts and circumstances in proof, and by considering them in connection with their knowledge, observation and experience in the business affairs of life."

Said instruction is objected to because it refers to plaintiff's declaration wherein it is alleged that the injuries complained of will for the rest of her life, disable plaintiff <u>from attending to her affairs and business</u>.

A similar instruction in a case brought by an adult was approved in <u>North Chicago Street R. R. Co. v. Ziemkiewicz</u>, 180 Ill. 466, wherein the declaration contained an allegation (not set forth in said opinion) that plaintiff, because of the injuries complained of, was "hindered and prevented from transacting her business affairs."

In the instant case there was no attempt to establish a basis for damages except for suffering. It was admitted by plaintiff's attending physician that there was no permanent injury. It seems improbable in this state of the record that the jury were led to consider anything other than pain and suffering endured by plaintiff, and the amount of the verdict does not indicate that they did. We cannot assume that the jury acted upon the theory that there was a permanent injury, and no such inference can be legitimately drawn from the evidence. We do not think, therefore, that the giving of such instruction was reversible error.

The injury complained of was a fracture of the neck of the right humerus. The evidence tended to show a union of the fragments of bone at point of fracture, and at the time of the trial, (nearly three years following the date of the injury) some limitation of motion. We do not think the verdict excessive. The judgment of the Superior Court should be affirmed.

628 - 22026

MARY HOFFMAN, a minor by Apolonia Hoffman, her next friend, Appellee, vs. CHICAGO RAILWAYS COMPANY, a corporation, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

In this case plaintiff recovered a judgment against defendant for $1500 as damages for injuries received by her while walking across a public highway by being struck by a street car owned and operated by defendant. Defendant contends that, (1) the verdict is against the manifest weight of the evidence, (2) the court erred in its instructions to the jury, and (3) the damages are excessive. At the time of the said occurrence, plaintiff was about eight years old.

The jury was in a better position than this court to determine from the age, intelligence and experience of the plaintiff, together with the other facts and circumstances in evidence, whether she was in the exercise of ordinary care, and whether defendant's servants in the operation of the car were negligent at and before the time in question. We are unable to say that the verdict is against the manifest weight of the evidence.

Defendant contends that the court erred in giving the following instruction:

> "If from the evidence of the case and under the instructions of the court the jury shall find the issue for the plaintiff, and that the plaintiff has sustained damages as charged in the declaration, then, to enable the jury to estimate the amount of such damages it is

MARY HOYNAK, a minor by Apolonia Hoynak, her next friend, Appellee,	APPEAL FROM
vs.	SUPERIOR COURT,
CHICAGO RAILWAYS COMPANY, a corporation, Appellant.	COOK COUNTY.

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

In this case plaintiff recovered a judgment against defendant for $1500 as damages for injuries received by her while walking across a public highway by being struck by a street car owned and operated by defendant. Defendant contends that, (1) the verdict is against the manifest weight of the evidence, (2) the court erred in its instructions to the jury, and (3) the damages are excessive. At the time of the said occurrence, plaintiff was about eight years old.

The jury was in a better position than this court to determine from the age, intelligence and experience of the plaintiff, together with the other facts and circumstances in evidence, whether she was in the exercise of ordinary care, and whether defendant's servants in the operation of the car were negligent at and before the time in question. We are unable to say that the verdict is against the manifest weight of the evidence.

Defendant contends that the court erred in giving the following instruction:

"If from the evidence of the case and under the instructions of the court the jury shall find the issues for the plaintiff, and that the plaintiff has sustained damages as charged in the declaration, then, to enable the jury to estimate the amount of such damages it is

> not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jury may themselves make such estimate from the facts and circumstances in proof, and by considering them in connection with their knowledge, observation and experience in the business affairs of life."

Said instruction is objected to because it refers to plaintiff's declaration wherein it is alleged that the injuries complained of will for the rest of her life, disable plaintiff from attending to her affairs and business.

A similar instruction in a case brought by an adult was approved in North Chicago Street R. R. Co. v. Fitzgibbons, 180 Ill. 466, wherein the declaration contained an allegation (not set forth in said opinion) that plaintiff, because of the injuries complained of, was "hindered and prevented from transacting her business affairs."

In the instant case there was no attempt to establish a basis for damages except for suffering. It was admitted by plaintiff's attending physician that there was no permanent injury. It seems improbable in this state of the record that the jury were led to consider anything other than pain and suffering endured by plaintiff, and the amount of the verdict does not indicate that they did. We cannot assume that the jury acted upon the theory that there was a permanent injury, and no such inference can be legitimately drawn from the evidence. We do not think, therefore, that the giving of such instruction was reversible error.

The injury complained of was a fracture of the neck of the right humerus. The evidence tended to show a union of the fragments of bone at point of fracture, and at the time of the trial, (nearly three years following the date of the injury) some limitation of motion. We do not think the verdict excessive. The judgment of the Superior Court should be affirmed.

AFFIRMED.

> not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jury may themselves make such estimate from the facts and circumstances in proof, and by considering them in connection with their knowledge, observation and experience in the business affairs of life."

Said instruction is objected to because it refers to plaintiff's declaration wherein it is alleged that the injuries complained of will for the rest of her life, disable plaintiff from attending to her affairs and business.

A similar instruction in a case brought by an adult was approved in North Chicago Street R. R. Co. v. Ritzwilbonn, 180 Ill. 466, wherein the declaration contained an allegation (not set forth in said opinion) that plaintiff, because of the injuries complained of, was "hindered and prevented from transacting her business affairs."

In the instant case there was no attempt to establish a basis for damages except for suffering. It was admitted by plaintiff's attending physician that there was no permanent injury. It seems improbable in this state of the record that the jury were led to consider anything other than pain and suffering endured by plaintiff, and the amount of the verdict does not indicate that they did. We cannot assume that the jury acted upon the theory that there was a permanent injury, and no such inference can be legitimately drawn from the evidence. We do not think, therefore, that the giving of such instruction was reversible error.

The injury complained of was a fracture of the neck of the right humerus. The evidence tended to show a union of the fragments at some at point of fracture, and at the time of the trial, (a only three years following the date of the injury) some limitation of motion. We do not think the verdict excessive. The judgment of the Superior Court should be affirmed.

106 - 22046

GUSTAVE A. OEHLER,
Plaintiff in Error,

vs.

CHARLES BRAND,
Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

204 I.A. 415

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This was an action in replevin. At the close of plaintiff's evidence the court directed a verdict in favor of defendant and entered judgment thereon for possession of the replevied chattels.

The main question presented for determination is - was there a valid delivery to plaintiff of a certain chattel mortgage executed by defendant, conveying to plaintiff, as grantee, the chattels in question? The undisputed evidence is that said chattel mortgage purporting to be given to secure the payment to plaintiff of defendant's promissory note for $360, together with said note, was given to a certain A. J. Schoenecke, for conditional delivery. Among other conditions it was agreed by the parties that said mortgage and note were to be held by the escrowee until defendant and plaintiff would direct him to deliver same to plaintiff. Contrary to such condition the mortgage and note in question were delivered by said escrowee to plaintiff without the knowledge, direction or consent of defendant. It is manifest that such delivery was wholly ineffectual to pass title to plaintiff. Stanley v. Valentine et al., 79 Ill. 544. The chattel mortgage in question could not have become operative until all of the conditions of the escrow agreement had been complied with. Burnap v. Sharpsteen et al., 149 Ill.

GUSTAVUS A. OHLSEN, Plaintiff in Error,	
vs.	ERROR TO MUNICIPAL COURT OF CHICAGO.
CHARLES BRAND, Defendant in Error.	

MR. JUSTICE McCONNELL DELIVERED THE OPINION OF THE COURT.

This was an action in replevin. At the close of plaintiff's evidence the court directed a verdict in favor of defendant and entered judgment thereon for possession of the replevied chattels.

The main question presented for determination is - was there a valid delivery to plaintiff of a certain chattel mortgage executed by defendant, conveying to plaintiff, as grantee, the chattels in question? The undisputed evidence is that said chattel mortgage purporting to be given to secure the payment to plaintiff of defendant's promissory note for $350, together with said note, was given to a certain A. J. Schoenecke, for conditional delivery. Among other conditions it was agreed by the parties that said mortgage and note were to be held by the escrowee until defendant and plaintiff would direct him to deliver same to plaintiff. Contrary to such condition the mortgage and note in question were delivered by said escrowee to plaintiff without the knowledge, direction or consent of defendant. It is manifest that such delivery was wholly inefficacious to pass title to plaintiff. Stanley v. Valentine et al., 79 Ill. 544. The chattel mortgage in question could not have become operative until all of the conditions of the escrow agreement had been complied with. Burgess v. Shepardson et al., 149 Ill.

225; Grindle et al. v. Grindle et al., 240 Ill. 143.

As plaintiff predicated his right of possession wholly upon said note and chattel mortgage, and as no title to the property in question passed with the wrongful delivery of said instruments, an action of replevin under such circumstances cannot be maintained. The judgment of the Municipal Court is affirmed.

AFFIRMED.

228; Grindle et al. v. Grindle et al., 240 III. 142.

"As plaintiff predicated his right of possession wholly upon said note and chattel mortgage, and as no title to the property in question passed with the wrongful delivery of said instruments, an action of replevin under such circumstances cannot be maintained. The judgment of the Municipal Court is affirmed.

AFFIRMED.

115 - 22058

LOUIS GOLDSTEIN,
Defendant in Error,

vs.

DOMONICK MARUBIO and
JAMES L. MORRIS,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

204 I.A. 417

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This is an action in replevin brought by Louis Goldstein against Domonick Marubio and James L. Morris. The court found the right of possession of the property replevied in plaintiff, and entered judgment against defendants on such finding.

Plaintiff in response to an advertisement, called on defendant Marubio on Sept. 15, 1914, in regard to the purchase of two wagons offered for sale by the latter. He testified that Marubio at that time stated to plaintiff that he had only one wagon then in his possession; that plaintiff had an understanding with Marubio that the latter would loan to plaintiff a wagon in lieu of the one missing, and if within a reasonable time thereafter Marubio could deliver to plaintiff the original wagon in good condition, he would pay the latter $50 for both wagons; that he then paid Marubio $5 on account of such purchase, took possession of both wagons and within 5 or 6 days returned to defendant the borrowed wagon, retaining the other. Three weeks later plaintiff paid Marubio $20, which he said Marubio accepted as payment in full for the wagon retained, although the latter's receipt given therefor to plaintiff, and introduced in evidence, does not so indicate.

Marubio testified that at the time in question he had in his possession both wagons which he had advertised

LOUIS COLBERTIN,
Defendant in Error,

vs.

DOMONICK MARUBIO and
JAMES I. MORRIS,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

20-I.A.-417

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This is an action in replevin brought by Louis Colbertin against Domonick Marubio and James I. Morris. The court found the right of possession of the property replevied in plaintiff, and entered judgment against defendants on such finding.

Plaintiff in response to an advertisement, called on defendant Marubio on Sept. 16, 1916, in regard to the purchase of two wagons offered for sale by the latter. He testified that Marubio at that time stated to plaintiff that he had only one wagon then in his possession; that plaintiff had an understanding with Marubio that the latter would loan to plaintiff a wagon in lieu of the one missing, and if within a reasonable time thereafter Marubio could deliver to plaintiff the original wagon in good condition, he would pay the latter $50 for both wagons; that no sum paid Marubio $5 on account of such purchase, took possession of both wagons and within 3 or 4 days returned to defendant the borrowed wagon, retaining the other. Three weeks later plaintiff paid Marubio $20, which he said Marubio accepted as payment in full for the wagon retained, although the latter's receipt given therefor to plaintiff, and introduced in evidence, does not so indicate.

Marubio testified that at the time in question he

for sale; that plaintiff purchased same for $50, paying $5 on account thereof, and said he would return and pay Marubio $45, the balance of said purchase price. Another receipt from Marubio to plaintiff was admitted in evidence, showing payment of $5, and indicating the sale of two wagons for $50. Marubio further testified that during his absence, plaintiff returned to Marubio's barn, taking both wagons, without leaving the balance of the purchase price therefor; that about two months thereafter, he demanded of plaintiff the balance of the purchase price or return of the wagons; that plaintiff thereupon paid him $20 and promised payment of balance within a few days; that the following day Marubio found the "poorer" of the two wagons outside of the latter's barn; that some days later, upon refusal of plaintiff to make payment, Marubio took possession of the remaining wagon.

About 9 or 10 months thereafter, viz., Aug. 1915, defendant Morris purchased from Marubio the wagon in question without notice of any claim thereto by plaintiff. During the same month, plaintiff took the wagon from the possession of Morris, presumably during the latter's absence, resulting in the former's arrest. The court, in the proceeding which followed, directed plaintiff to return the wagon to Morris, which he did, and thereafter replevied same.

While there is a conflict of evidence as to the terms of the purchase, it is apparent that Marubio in taking back the wagon in question thereby treated the contract as rescinded; plaintiff impliedly acquiesced in considering the contract as rescinded, for he took no action in relation to same, from Nov. 1914 to Aug. 1915, at which latter time, he took the wagon from defendant Morris, an innocent purchaser, to whom he was directed by order of court to return same, as

for sale; that plaintiff purchased same for $50, paying $5 on account thereof, and said he would return and pay Murphy to $45, the balance of said purchase price. Another receipt from Murphy to plaintiff was admitted in evidence, showing payment of $5, and indicating the sale of two wagons for $50. Murphy further testified that during his absence, plaintiff returned to Murphy's barn, taking both wagons, without leaving the balance of the purchase price therefor; that about two months thereafter, he demanded of plaintiff the balance of the purchase price or return of the wagons; that plaintiff thereupon paid him $20 and promised payment of balance within a few days; that the following day Murphy found the "poorer" of the two wagons outside of the latter's barn; that some days later, upon refusal of plaintiff to make payment, Murphy took possession of the remaining wagon.

About 9 or 10 months thereafter, viz., Aug. 1919, defendant Morris purchased from Murphy the wagon in question without notice of any claim thereto by plaintiff. Having the same work, plaintiff took the wagon from the possession of Morris, presumably during the latter's absence, resulting in the former's arrest. The court, in the proceeding which followed, directed plaintiff to return the wagon to Morris, which he did, and thereafter replevied same.

While there is a conflict of evidence as to the terms of the purchase, it is apparent that Murphy in taking back the wagon in question thereby treated the contract as rescinded; plaintiff impliedly acquiesced in rescission by his consent as recited, for he took no action in relation to same, from Nov. 1914 to Aug. 1919, at which later time, he took the wagon from defendant Morris, on instant purchaser, to whom he was directed by order of court to return same, as

above stated. These facts show that plaintiff was not entitled to its possession. The judgment of the Municipal Court is therefore reversed and the cause remanded with directions for a retorno.

REVERSED AND REMANDED WITH DIRECTIONS.

above stated. These facts show that plaintiff was not entitled to its possession. The judgment of the Municipal Court is therefore reversed and the cause remanded with directions for a retrial.

REVERSED AND REMANDED WITH DIRECTIONS.

140 - 22087

PHILIP K. RUSSELL, Defendant in Error, vs. GEORGE S. COCHRAN, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This was an action of the fourth class brought in the Municipal Court upon a foreign judgment for the recovery of money. Plaintiff in his statement of claim alleged that there was due and owing him from defendants $962.33 on a certain judgment rendered in plaintiff's favor and against defendants in the District Court of Hennepin County, Minn., on Jan. 3, 1914, as follows:

"Judgment	$1,079.41
Interest for twenty months	107.92
	$1,187.33
By cash paid in partial satisfaction, July 1, 1914	225.00
	$ 962.33"

Plaintiff in his affidavit of claim, recited, in substance, that said cause was a suit upon a contract for the payment of money and that the nature of the claim was as above set forth. A default for want of appearance and judgment for $962.33 was entered against George S. Cochran, sole defendant in the instant case. Defendant, in an affidavit filed in support of his motion to vacate said judgment and for leave to defend, alleged that said statement of claim was insufficient; that said action was an action in debt; that there was no proper evidence introduced in support of said judgment; that he was never served personally with summons

140 - 22CCY

PHILIP K. RUSSELL,
Defendant in Error,

vs.

GEORGE S. COGHLAN,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

204 I.A. 418

MR. JUSTICE MCGOOEY DELIVERED THE OPINION OF THE COURT.

This was an action of the fourth class brought in the municipal Court upon a foreign judgment for the recovery of money. Plaintiff in his statement of claim alleged that there was due and owing him from defendants $982.33 on a certain judgment rendered in plaintiff's favor and against defendants in the District Court of Hennepin County, Minn., on Jan. 3, 1914, as follows:

"Judgment.....	$1,170.42
Interest for twenty months	127.89
	$1,187.33
By cash paid in partial satisfaction, July 1, 1914.....	225.00
	$ 982.33"

Plaintiff in his affidavit of claim, recited, in substance, that said cause was a suit upon a judgment for the payment of money and that the nature of the claim was as above set forth. A default for want of appearance and judgment for $982.33 was entered against George S. Coghlan, sole defendant in the instant case. Defendant, in an affidavit filed in support of his motion to vacate said judgment and for leave to defend, alleged that said statement of claim was insufficient; that said action was an action in tort; that there was no proper evidence introduced in support of said

in the proceedings wherein the foreign judgment was entered and that said judgment was void. Said motion was denied and this writ of error was sued out to review the correctness of said judgment.

In cases of the fourth class it seems manifest that the Municipal Court has jurisdiction in actions of debt, as well as in contract. In the case of Maiss v. Met. Amusement Ass'n, 146 Ill. App. 196, this court said:

> "We think it was clearly the intention of the Legislature to give the Municipal Court jurisdiction in actions of the fourth class in all legal actions, as distinguished from equitable, when the amount claimed does not exceed $1,000, and not to limit its jurisdiction to actions on contract or for money due or owing."

This was a legal action. The amount of plaintiff's claim did not exceed $1,000. The nature of the claim as stated was easily understood and we are clearly of the opinion that the Municipal Court had jurisdiction.

Defendant urges as ground for reversal, that no proper evidence was introduced in support of the judgment in the instant case. The rules of the Municipal Court are not before us and in their absence we must presume that the court acted regularly and in accordance with its rules in entering judgment upon plaintiff's affidavit of claim. Goding v. The MacArthur Co., 181 Ill. App. 373; Edson Keith & Co. v. Keevan et al., 183 Ill. App. 187.

Defendant in his said affidavit failed to show any exercise of diligence or any reason why He did not appear in court when summoned. In the absence of such showing, the court did not abuse its discretion in refusing to set aside said default and to vacate said judgment. Hartford Life & Annuity Ins. Co. v. Rossiter et al., 196 Ill. 277. And this is true even if defendant had a meritorious defense. Plaff v. Pac. Exp. Co., 251 Ill. 243. The judgment of the Municipal Court is therefore affirmed.

AFFIRMED.

in the proceedings wherein the foreign judgment was entered and that said judgment was void. Said motion was denied and this writ of error was sued out to review the correctness of said judgment.

In cases of the fourth class it seems manifest that the Municipal Court has jurisdiction in actions of debt, as well as in contract. In the case of Wales v. Met. Amusement Ass'n, 148 Ill. App. 129, this court said:

> "We think it was clearly the intention of the legislature to give the Municipal Court jurisdiction in actions of the fourth class in all legal actions, as distinguished from equitable, when the amount claimed does not exceed $1,000, and not to limit its jurisdiction to actions on contract or for money due or owing."

This was a legal action. The amount of plaintiff's claim did not exceed $1,000. The nature of the claim as stated was easily understood and we are clearly of the opinion that the Municipal Court had jurisdiction.

Defendant urges as ground for reversal, that no proper evidence was introduced in support of the judgment in the instant case. The rules of the municipal Court are not before us and in their absence we must presume that the court acted regularly and in accordance with its rules in entering judgment upon plaintiff's affidavit of claim. Dodge v. The Manufacturer Co., 101 Ill. App. 273; Wilson Keith & Co. v. Keenan et al., 102 Ill. App. 187.

Defendant in his said affidavit failed to show any exercise of diligence or any reason why he did not appear in court when summoned. In the absence of such showing, the court did not abuse its discretion in refusing to set aside said default and to vacate said judgment. Hartford Life & Annuity Ins. Co. v. Koelter et al., 196 Ill. 277. And this is true even if defendant had a meritorious defense. Hart v. Exp. Exp. Co., 201 Ill. 242. The judgment of the municipal

140 - 22087

PHILIP K. RUSSELL, Defendant in Error,	ERROR TO
vs.	MUNICIPAL COURT OF CHICAGO.
GEORGE S. COCHRAN, Plaintiff in Error.	

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This was an action of the fourth class brought in the Municipal Court upon a foreign judgment for the recovery of money. Plaintiff in his statement of claim alleged that there was due and owing him from defendants $962.33 on a certain judgment rendered in plaintiff's favor and against defendants in the District Court of Hennepin County, Minn., on Jan. 3, 1914, as follows:

"Judgment.....	$1,079.41
Interest for twenty months	107.92
	$1,187.33
By cash paid in partial satisfaction, July 1, 1914.....	225.00
	$ 962.33"

Plaintiff in his affidavit of claim, recited, in substance, that said cause was a suit upon a contract for the payment of money and that the nature of the claim was as above set forth. A default for want of appearance and judgment for $962.33 was entered against George S. Cochran, sole defendant in the instant case. Defendant, in an affidavit filed in support of his motion to vacate said judgment and for leave to defend, alleged that said statement of claim was insufficient; that said action was an action in debt; that there was no proper evidence introduced in support of said judgment; that he was never served personally with summons

140 - 82027

PHILIP A. RUSSELL, Defendant in error,	ERROR TO
vs.	MUNICIPAL COURT
GEORGE S. COGHLAN, Plaintiff in error.	OF CHICAGO.

MR. JUSTICE DOCKERY DELIVERED THE OPINION OF THE COURT.

This was an action of the fourth class brought in the municipal court upon a foreign judgment for the recovery of money. Plaintiff in his statement of claim alleges that there was due and owing him from defendants $982.32 on a certain judgment rendered in plaintiff's favor and against defendants in the circuit court of Hennepin county, Minn., on Jan. 3, 1911, as follows:

Judgment	$1,092.41
Interest for twenty months	164.72
	$1,257.13
Amount paid in partial satisfaction, July 1, 1912	275.00
	$982.32

Plaintiff in his affidavit of claim, filed, in the court below, that suit, cause for a joint judgment for the payment of money was that the defendants in the trial court in above set forth. A default, not a [illegible] judgment for $982.32 was entered against defendants [illegible], not appearing in the instant case. Defendants, in an affidavit filed in support of his motion to vacate said judgment on the ground so defaced, alleged that said statement of [illegible] insufficient; that said action was an action in rem; that there was no proper evidence introduced in support of said

in the proceedings wherein the foreign judgment was entered and that said judgment was void. Said motion was denied and this writ of error was sued out to review the correctness of said judgment.

In cases of the fourth class it seems manifest that the Municipal Court has jurisdiction in actions of debt, as well as in contract. In the case of Maiss v. Met. Amusement Ass'n, 146 Ill. App. 196, this court said:

> "We think it was clearly the intention of the Legislature to give the Municipal Court jurisdiction in actions of the fourth class in all legal actions, as distinguished from equitable, when the amount claimed does not exceed $1,000, and not to limit its jurisdiction to actions on contract or for money due or owing."

This was a legal action. The amount of plaintiff's claim did not exceed $1,000. The nature of the claim as stated was easily understood and we are clearly of the opinion that the Municipal Court had jurisdiction.

Defendant urges as ground for reversal, that no proper evidence was introduced in support of the judgment in the instant case. The rules of the Municipal Court are not before us and in their absence we must presume that the court acted regularly and in accordance with its rules in entering judgment upon plaintiff's affidavit of claim. Goding v. The MacArthur Co., 181 Ill. App. 373; Edson Keith & Co. v. Keevan et al., 183 Ill. App. 187.

Defendant in his said affidavit failed to show any exercise of diligence or any reason why He did not appear in court when summoned. In the absence of such showing, the court did not abuse its discretion in refusing to set aside said default and to vacate said judgment. Hartford Life & Annuity Ins. Co. v. Rossiter et al., 196 Ill. 277. And this is true even if defendant had a meritorious defense. Plaff v. Pac. Exp. Co., 251 Ill. 243. The judgment of the Municipal Court is therefore affirmed.

AFFIRMED.

in the proceedings wherein the foreign judgment was entered and that said judgment was void. Said motion was denied and this writ of error was sued out to review the correctness of said judgment.

In case of the fourth class it seems manifest that the municipal Court has jurisdiction in actions of debt, as well as in contract. In the case of Yates v. Met. Management Ass'n, 145 Ill. App. 106, this court said:

> "We think it was clearly the intention of the legislature to give the Municipal Court jurisdiction in actions of the fourth class in all legal actions, as distinguished from equitable, when the amount claimed does not exceed $1,000, and not to limit its jurisdiction to actions on contract or for money due or owing."

This was a legal action. The amount of plaintiff's claim did not exceed $1,000. The nature of the claim as stated was easily understood and we see clearly of the opinion that the Municipal Court had jurisdiction.

Defendant argues as ground for reversal, that no proper evidence was introduced in support of the judgment in the instant case. The rules of the Municipal Court are not before us and in their absence we must presume that the court acted regularly and in accordance with its rules in entering judgment upon plaintiff's affidavit of claim. Higgins v. The Mercantile Co., 181 Ill. App. 279; Wilson Ketch & Co. v. Keeran et al., 183 Ill. App. 104.

Defendant in his motion affidavit filed to show any exercise of diligence or any reason why he did not appear in court when summoned. In the absence of such showing, the court did not abuse its discretion in denying the motion to set aside default and to vacate said judgment. Wattles v. Annuity Ins. Co. v. Vaughan et al., 190 Ill. App. 271. No error in time even if defendant has a meritorious defense. Ziegler v. Pac. Exp. Co., 221 Ill. 218. The judgment of the Municipal

268 - 22702

HERMAN HOLLATZ et al.,
Appellants,

vs.

FREDERICK H. GERBERDING et al.,
Appellees.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

204 I.A. 419

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Complainants by bill sought to have defendant Gerberding enjoined from building a garage on Chicago avenue, alleging noncompliance with a city ordinance relating to the location of garages. Upon hearing by the chancellor it was ordered that the bill be dismissed for want of equity, from which complainants appeal.

The material provisions of the ordinance claimed to have been violated are -

> "Nor shall any person, firm or corporation locate, build, construct or maintain any garage, in the city, in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, or within one hundred feet of any such street in any such block without the written consent of the majority of the property owners according to the frontage on both sides of the street. * * * Provided, that in determining whether two-thirds of the building on both sides of such street were used exclusively for residence purposes any building fronting upon another street and located upon a corner lot shall not be considered."

While it is proposed to build the garage in question fronting upon Chicago avenue, it is located within 100 feet of Menard avenue, and the controversy centers around the character of Menard avenue in the block running south from Chicago avenue to Superior street. It is claimed by complainants that two-thirds of the buildings in this block are used exclusively for residence purposes, and

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HERMAN HOLLATZ et al., Appellants.	
vs.	APPEAL FROM DECISION
MERRIMACK M. CHERNIAVSKO et al., Appellees.	COURT OF COOK COUNTY.

JUNIA.419

MR. PRESIDING JUSTICE MCSURELY

DELIVERED THE OPINION OF THE COURT.

Complainants by bill sought to have defendant corporation enjoined from building a garage on Chicago avenue, alleging noncompliance with a city ordinance relating to the location of garages. Upon hearing by the chancellor it was ordered that the bill be dismissed for want of equity, from which complainants appeal.

The material provisions of the ordinance claimed to have been violated are -

> "Nor shall any person, firm or corporation lease, build, construct or maintain any garage, in the city, in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, except in the one hundred feet of any such street in any block which shall be cut by the written consent of the owners of the property owners residing in the five lots on both sides of the street. [illegible] Provided, that in cases having another two-thirds of the buildings on both sides of such street were used exclusively for [illegible] garage any building fronting upon [illegible] located upon [illegible] shall be [illegible]."

[illegible] in conservation fronting [illegible] in the location within 100 feet of [illegible] around the [illegible] south from Chicago avenue [illegible]. It is claimed by complainants that two-[illegible] of the buildings in this block are used exclusively for residence purposes, and

that therefore under the provisions of the ordinance the garage cannot be built without frontage consents.

What buildings in this block should be counted? There are only four of them, two on each side of the street, and all four standing upon corner lots. Clearly those on the two corners of Chicago avenue and Menard avenue front on both streets. They are occupied by stores with entrances on the corner and show windows on each street. There is no question as to the frame residence on the northeast corner of Menard and Superior; it clearly fronts on Superior. It follows, therefore, that in determining the character of occupancy none of these three buildings should be counted under the proviso of the ordinance excluding "any building fronting upon another street and located upon a corner lot."

It is not so easy to characterize the flat building at the northwest corner of Menard and Superior. We are not led to conclude that the building should be considered as used for business because a physician, occupying one of the apartments, received and treated patients therein, or had his name in the window.

This building has a frontage of 40 feet on Superior and 117 feet on Menard. It has two entrances, both on Menard, none on Superior. It might properly be said that such a building fronts on Menard because of the entrances on that street. But does it necessarily follow that it does not also front on Superior? In other words, does the location of the entrance alone determine upon which street a corner building fronts? The only reported case in point to which we are referred is <u>In re Dinmick and McCallum</u>, 26 Ontario Law Reports 551, where the court said:

"Any side or face of a building is a front,

that therefore under the provisions of the ordinance the garage cannot be built without frontage consents.

What buildings in this block should be counted? There are only four of them, two on each side of the street, and all four abutting upon corner lots. Every one of those on the two corners of Dundas street and Sandwich avenue front on both streets. They are bounded by stores with entrances on the corner and show windows on each street. There is no question as to the frame residence on the northwest corner of Sandwich and Superior; it clearly faces on Superior. It follows, therefore, that in determining the "number of occupancy units of these four buildings which is counted under the proviso of the ordinance giving "any building fronting upon another street and located upon a corner lot."

It is not so easy to determine what "building" at the northwest corner of Dundas and Sandwich. We are not left to guessing what the building should consist of, as we find that [illegible] the [illegible] one of the apartments, [illegible] [illegible] in, so that the main part is the apartment.

This building has frontage on [illegible] on Dundas and 117 feet on Sandwich. [illegible] on Dundas, with [illegible] Sandwich. [illegible] that such a building [illegible] on the [illegible] street. [illegible] not also [illegible] [illegible] of the [illegible] corner building fronting [illegible] to which we are referred is to be [illegible] [illegible] 56 Ontario law Reports 201, where the [illegible] said:

"Any side or face of a building [illegible] section,

although the word is more commonly used to denote the entrance side. New England Dict. sub. voc. Front, page 563; Col. 3, Para. 6. Back front, rear front, the four fronts, of a house, are all terms in common use, and there is no reason why a building should not 'front' on two, three or four streets."

And again -

"While a building at the corner of two streets is numbered on the street upon which its main entrance fronts, and is in common parlance spoken of as 'on that street,' it also lies along or borders on the other street, and in the relation of environing is also on that street, and such street would also be in front of that part of the building adjoining it."

We might feel inclined to the same view if necessary to a decision in this case, but the propriety of the decree under consideration need not rest upon this point.

A conclusive ground in support of the decree of the chancellor is that it was shown that defendant Gerberding had secured the consents of the majority of the property owners according to frontage on both sides of Menard avenue. We do not agree with complainants' contention as to the construction of this provision of the ordinance. We are of the opinion that the language clearly indicates that while in determining the residential character or otherwise of the block, the corner lots are not to be considered, yet when consents are to be obtained the entire frontage, including the corner lots, are to be counted.

The defendant secured the consents of the owners of the frontage on the east side of Menard avenue, but not on the west side. Ordinarily this would not be a majority of the frontage on both sides, but the evidence proves beyond dispute that in this particular block the frontage on the east side is greater than on the west side of the street; the difference in favor of the east side of the street is apparently about four feet. This is not definite, but that

although the word is more commonly used to denote the entrance side. New England Dict. sub. voc. front, page 663; Cod. 3, tract. 6. "Such front, rear front, the four fronts, of a house, are all terms in common use, and there is no reason why a building should not 'front' on two, three or four streets."

And again -

"While a building at the corner of two streets is described on the street upon which its main entrance fronts, and is in common parlance spoken of as 'on that street,' it also lies along or borders on the other street, and in the relation of advertising is also on that street, and may, street wall, also be in front of that part of the building adjoining it."

We might feel inclined to take this view if necessarily to a decision in this case, but the propriety of the decree under consideration need not test upon this point.

A conflicting ground in support of the decree of the chancellor is that it was known that defendant Carter had secured the consents of the majority of the property owners according to frontage in both sides of Fourth avenue. We do not agree that conditional consents as to the construction of this pavement on the ex parte request of one of the opinion that the language clearly implies that while in determining the total of all property to consent of the block, the owner's lots are to be counted, yet when consents are to be obtained on a front foot basis, including the corner lots, are to be counted.

The statute contains a condition of the [illegible] of the frontage [illegible] line of [illegible] on the east side. [illegible] of the frontage [illegible] - [illegible] shows that [illegible] on the west side [illegible] street; the difference in favor of the east side [illegible] apparently about four feet. This is not definite, but [illegible]

there is an excess on the east side is not denied, and any excess on this side would give the defendant a majority of the frontage on both sides.

It follows from what we have said that we are of the opinion that the chancellor properly dismissed the bill for want of equity, and the decree is affirmed.

AFFIRMED.

there is an excess on the east side is not denied, and any excess on this side would give the defendant a majority of the frontage on both sides.

It follows from what we have said that we are of the opinion that the chancellor properly dismissed the bill for want of equity, and the decree is affirmed.

AFFIRMED.

295 - 22729

H. KLAVEN,
Appellee,

vs.

ISAAC STEIN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

204 I.A. 421

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, alleging damages by reason of the breach by defendant of a contract to sell plaintiff a quantity of men's underwear, upon trial by the court had judgment for $148.75, which defendant seeks to have reversed.

Without detailing all of the conversation between the parties, which was bargaining talk, it is sufficient to say that the court could properly find that the parties finally arrived at a definite agreement by which the defendant sold to the plaintiff 170 dozens of men's underwear at $3.12½ per dozen; that defendant was to deliver them to plaintiff's place of business, and after they were "checked up" the money was to be paid.

This being the contract of the parties, it was unnecessary, as is argued by counsel for the defendant, that plaintiff should have first made a tender of the payment. Cases holding that under other circumstances it is incumbent upon the purchaser to make a tender of payment are not in point. Plaintiff was not bound to pay until the goods were delivered and counted.

The fact that defendant failed to carry out this agreement with plaintiff, but sold the lot to other parties, is not in dispute.

The contract claimed by plaintiff is clearly

295 - 22729

H. KLAVEN,
Appellee,

vs.

ISAAC STEIN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MORAN

DELIVERED THE OPINION OF THE COURT.

Plaintiff, alleging damages by reason of the breach by defendant of a contract to sell plaintiff a quantity of men's underwear, upon trial by the court had judgment for $148.75, which defendant seeks to have reversed.

Without detailing all of the conversation between the parties, which was bargaining talk, it is sufficient to say that the court could properly find that the parties finally arrived at a definite agreement by which the defendant sold to the plaintiff 170 dozens of men's underwear at $3.15½ per dozen; that defendant was to deliver them to plaintiff's place of business, and after they were "checked up" the money was to be paid.

This being the contract of the parties, it was unnecessary, as is argued by counsel for the defendant, that plaintiff should have first made a tender of the payment. Cases holding that under other circumstances it is incumbent upon the purchaser to make a tender of payment are not in point. Plaintiff was not bound to pay until the goods were delivered and counted.

The fact that defendant failed to carry out this agreement with plaintiff, but sold the goods to other parties, is not in dispute.

The contract claimed by plaintiff is clearly

supported by the preponderance of the evidence, and he is entitled to recover the damages which it has been shown he suffered. The judgment is affirmed.

AFFIRMED.

supported by the preponderance of the evidence, and he is entitled to recover the damages which it has been shown he suffered. The judgment is affirmed.

AFFIRMED.

204/422

298 - 22732

Filed March 26, 1917

DAVID B. JONES,
Appellant,

vs.

RENAULT SELLING BRANCH,
a corporation,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

204 I.A. 422

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover a deposit of $1,500 made by him on a contract for the purchase of an automobile which, after inspection, he had refused to accept. Upon trial the jury returned a verdict adverse to his claim, and judgment was entered for the defendant, from which plaintiff appeals.

In October, 1913, plaintiff contracted with defendant for a new automobile - Renault chassis, made in France - price $7,500. At the time of the contract the car was in the New York sales room. Upon its arrival at defendant's place of business in Chicago it was inspected by plaintiff's chauffeur and other experienced persons, who advised plaintiff that the chassis was not new. A test was then made to determine the condition of its mechanism, and as a result of this plaintiff notified defendant that the chassis was not in accordance with the contract, that on account of failure of the defendant to comply therewith the contract was canceled, and the return of the deposit was requested. This was refused, and suit followed.

The variant testimony upon the trial related for the most part to the mechanical parts of the chassis, the

plaintiff seeking to show that these were so worn as to indicate that it was an old and used car and that it failed to meet the obligation of the defendant to furnish a new car. The defendant sought by testimony to show that there was only that normal degree of wear incident to the usual tests to which a new car is subjected and to its necessary movements in construction, assembling and marketing. Plaintiff introduced testimony tending to show that the degree of wear was such as to indicate that the chassis had been run eight to ten thousand miles - which amount of wear would obviously take the chassis out of the class designated as new. There was also testimony that the car left the factory in France in September, 1912, arrived in New York in November, 1912, and had been offered for sale from this time to the time of the contract with plaintiff in October, 1913. If the jury gave credence to plaintiff's testimony a verdict favorable to him would properly have followed, unless such result was prevented by improper instructions.

At the request of the defendant the court gave to the jury instruction No. 2 as follows:

> "You are instructed that the burden is upon the plaintiff to prove his case by a preponderance or greater weight of the testimony. So in this case the burden is upon the plaintiff to prove by a preponderance or greater weight of the testimony that the chassis furnished by the defendant under the contract with the plaintiff was a used or second-hand chassis, and unless the plaintiff so shows by a preponderance of greater weight of the testimony, he cannot recover and you should find the issues for the defendant."

This is misleading and should not have been given. From the evidence the jury could reasonably understand that "a used or second-hand chassis" was one that before that time had been sold to or used by a purchaser. Ordinarily such a car is so designated. It was not claimed by plaintiff that the chassis was of this kind, and as there

was no proof of any prior sale, the jury was bound by the instruction to find the issues for the defendant. The important elements of age and wear were wholly omitted.

For the same reason it also was reversible error to give at defendant's request instruction No. 3, which is:

> "You are instructed that the plaintiff must show by a preponderance of a greater weight of the testimony that the chassis provided for the plaintiff by defendant was a used or second-hand chassis.
>
> "You are further instructed that a chassis which has been run only for the purpose of testing the chassis, showing to prospective purchasers, moved from place to place for the purpose of having equipment provided, and similar purposes, is not a used or second-hand chassis."

Plaintiff was entitled to receive a new car, virtually free from wear in its mechanical parts, and defendant cannot avoid its obligation to furnish such a car by showing that the wear in the chassis was produced by showing it to prospective purchasers or moving it from place to place for the purpose of having equipment provided, "and similar purposes." It is conceivable that by considerable use for these purposes alone a car could be so worn as materially to impair operation.

Defendant's instruction No. 4 is open to the same criticism by telling the jury, in effect, that even if these particular uses wore the chassis to the breaking point plaintiff was not entitled to recover. Plaintiff based his claim upon evidence showing age and wear from whatever cause or uses, and if the jury should believe that these had been shown to a greater degree than reasonably should be in a new car of this kind and price, he was entitled to recover.

It is suggested by counsel for plaintiff that

defendant sold the car in question five or six months after suit was brought, and that this amounts to a rescission justifying this court in entering judgment for the plaintiff. We cannot do this. Where no supplemental pleadings have been filed the rights of the parties must be determined according to the facts existing at the time the action was commenced. Hutchinson v. Coonley, 209 Ill. 437.

For the reasons above indicated the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

302 - 22736

JOHN YANGAS,
Appellant,

vs.

MAX WEINSCHENK, JOHN SHUERGER, JOHN I. BARTLEY and THE NORTH SIDE STATE SAVINGS BANK,
Appellees.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

204 I.A. 424

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Complainant filed a creditor's bill on a judgment recovered by him on December 8, 1914, against the defendant Weinschenk. It was alleged that Weinschenk was the owner of an undivided one-third interest in the Dearborn Baking Company and in its bank account kept in the North Side State Savings Bank. The bank answered admitting a deposit to the credit of the Dearborn Baking Company but asserted that it did not know that Weinschenk was interested therein. The other defendants, Shuerger and Bartley, answered denying that Weinschenk was a copartner in the Dearborn Baking Company. The cause was referred to a master in chancery who, after hearing evidence, made a report recommending that the bill be dismissed for want of equity. Upon hearing before the chancellor upon exceptions to the master's report, these were overruled and a decree entered dismissing the bill. From this complainant appeals.

From the evidence in the record we hold that the master and chancellor properly found that the three defendants, Weinshhenk, Shuerger and Bartley, on February 25, 1914, entered into a written copartnership to do business under the firm name of Dearborn Baking Company for a period of five

502 - 22736

JOHN YANGAS,
Appellant,

vs.

MAX WEINSCHENK, JOHN SHURGER, JOHN I. BARTLEY and THE NORTH SIDE STATE SAVINGS BANK,
Appellees.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE MORETHY
DELIVERED THE OPINION OF THE COURT.

Complainant filed a creditor's bill on a judgment recovered by him on December 6, 1914, against the defendant Weinschenk. It was alleged that Weinschenk was the owner of an undivided one-third interest in the Dearborn Baking Company and in its bank account kept in the North Side State Savings Bank. The bank answered admitting a deposit to the credit of the Dearborn Baking Company but asserted that it did not know that Weinschenk was interested therein. The other defendants, Shurger and Bartley, answered denying that Weinschenk was a copartner in the Dearborn Baking Company. The cause was referred to a master in chancery who, after hearing evidence, made a report recommending that the bill be dismissed for want of equity. Upon hearing before the chancellor upon exceptions to the master's report, these were overruled and a decree entered dismissing the bill. From this complainant appeals.

From the evidence in the record we hold that the master and chancellor properly found that the three defendants, Weinschenk, Shurger and Bartley, on February 25, 1914, entered into a written copartnership to do business under the firm name of Dearborn Baking Company for a period of five

years, but that should any of the partners desire to withdraw the others should have the right to purchase such interest; that at the time of entering into this agreement Shuerger advanced $600 and Bartley $300, but as Weinschenk was unable to advance cash, his share was advanced by Shuerger, and that to secure Shuerger, Weinschenk executed a note dated February 28, 1914, to the order of Shuerger, promising to pay him $300, and as security for the payment of this, Weinschenk's interest in the Dearborn Baking Company was transferred by proper words of assignment upon the note, with authority to Shuerger to sell said interest on failure of payment of the note. The note was due on demand, and on or about August 29, 1914, Weinschenk having failed to pay said $300 or any part thereof, by endorsement made upon the back of the note he assigned and quit-claimed to Shuerger, in consideration of the note being canceled, all his interest in the Dearborn Baking Company. Thereupon the name of Weinschenk was erased from the agreement of copartnership, and it was provided that Shuerger should bear two-thirds of the profits and losses and Bartley one-third. Before this time Weinschenk was authorized to sign checks, but after his transfer of his interest to Shuerger he ceased to have this authority. His only connection with the company thereafter was as a clerk upon a salary.

We have considered the testimony concerning statements made by Shuerger in November, 1914, to the representative of R. G. Dun & Company, but find nothing therein which could be construed as a statement that Weinschenk was at that time a partner. There was certain other testimony as to admissions made by Shuerger as to

years, but that among any of the partners desire to withdraw the others should have the right to purchase such interest; that at the time of entering into this agreement Shuerger advanced $600 and Bartley $300, but as Weinschenk was unable to advance cash, his share was advanced by Shuerger, and that to secure Shuerger, Weinschenk executed a note dated February 22, 1914, to the order of Shuerger, promising to pay him $300, and as security for the payment of this, Weinschenk's interest in the Northern Baking Company was transferred by proper words of assignment upon the note, with authority to Shuerger to sell said interest on failure of payment of the note. The note was due on demand, and on or about August 22, 1914, Weinschenk having failed to pay said $300 or any part thereof, by endorsement made upon the back of the note assigned and quit-claimed to Shuerger, in consideration of the note being cancelled, all his interest in the Northern Baking Company. Thereupon the name of Weinschenk was erased from the agreement of copartnership, and it was provided that Shuerger should bear two-thirds of the profits and losses and Bartley one-third. Before this time Weinschenk was authorized to sign checks, but after his transfer of his interest to Shuerger he ceased to have this authority. His only connection with the company thereafter was as a clerk upon a salary.

We have considered the testimony concerning statements made by Shuerger in November, 1914, to the representative of R. G. Dun & Company, but find nothing therein which could be construed as a statement that Weinschenk was at that time a partner. There was certain other testimony as to admissions made by Shuerger as to

Weinschenk's interest, which are denied by Shuerger. We have also considered the testimony tending to cast doubt upon the date of the endorsement made upon Weinschenk's note, and also the other variant testimony presented before the master. We are of the opinion that upon consideration of the entire record the master was justified in finding that the partnership between the defendants Shuerger, Bartley and Weinschenk was terminated on or about the 29th day of August, 1914, and that thereafter Weinschenk had no further or other interest in the business except as an employe upon a weekly salary, and that at the time of the commencement of the suit the partnership was not indebted to Weinschenk, and that Weinschenk had no interest in the bank account kept by the Dearborn Baking Company in the North Side State Savings Bank.

A few days after the bill was filed a receiver was appointed of the property belonging to Weinschenk and it was ordered that the defendants assign the interest of Weinschenk in the Dearborn Baking Company to the receiver. Afterwards they were ruled to show cause why they should not be held guilty of contempt of court in interfering with the receiver. The master recommended that the injunction restraining the North Side State Savings Bank from paying moneys held in the name of the Dearborn Baking Company be dissolved, and that the rule to show cause why the defendants should not be punished for contempt of court should be discharged. The channellor in approving and onnfirming the master's report entered the orders recommended.

We hold that the orders of the chancellor were proper and that the bill of complaint was rightly dismissed. The decree is therefore affirmed.

AFFIRMED.

Weinschenk's interest, which are denied by Smeeger. We have also considered the testimony tending to cast doubt upon the date of the endorsement made upon Weinschenk's note, and also the other variant testimony presented before the master. We are of the opinion that upon consideration of the entire record the master was justified in finding that the partnership between the defendants Smeeger, Bartley and Weinschenk was terminated on or about the 28th day of August, 1914, and that thereafter Weinschenk had no further or other interest in the business except as an employe upon a weekly salary, and that at the time of the commencement of the suit the partnership was not indebted to Weinschenk, and that Weinschenk had no interest in the bank account kept by the Dearborn Banking Company in the North Side State Savings Bank.

A few days after the bill was filed a receiver was appointed of the property belonging to Weinschenk and it was ordered that the defendants assign the interest of Weinschenk in the Dearborn Banking Company to the receiver. Afterwards they were ruled to show cause why they should not be held guilty of contempt of court in interfering with the receiver. The master recommends that the injunction restraining the North Side State Savings Bank from paying money held in the name of the Dearborn Banking Co. may be dissolved, and that the rule to show cause by the defendants should not be punished for contempt of court should be discharged. The chancellor in approving the master's report entered the order from which

We hold that the orders of the chancellor were proper and that the bill of complaint was rightly dismissed. The decree is therefore affirmed.

AFFIRMED.

311 - 22745

A. H. BAKER,
Appellant,

vs.

WILLIAM R. MORRISON,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

204 I.A. 429

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover a balance claimed to be due for professional services as a veterinary surgeon rendered to horses belonging to defendant, pursuant to a contract. It was asserted as a defense that plaintiff had negligently failed to perform this contract, thereby causing defendant's horses to suffer and die, with resultant damages. Upon trial by a jury verdict was returned for the plaintiff in the sum of one dollar upon which judgment was entered. Plaintiff appeals asking that this be reversed.

The material undertaking of the contract, which was in writing, was:

> "I propose to doctor twenty-four (24) horses for you by the month for ten dollars ($10.00) per month, * * I to furnish all veterinary services including operations and all necessary medicine."

This was signed by the plaintiff and accepted in writing by the defendant.

We are of the opinion that this contract calls for the personal services of the plaintiff, and that the jury properly could find from the evidence that for a large part of the time the plaintiff did not furnish personal service but sent graduates from a school in which he was an instructor; that at least three horses, during the last four months of the contract, to which period the court restricted evidence

A. H. BAUER,
Appellant,

vs.

WILLIAM R. MORRISON,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE DOBNEY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover a balance claimed to be due for professional services as a veterinary surgeon rendered to horses belonging to defendant, pursuant to a contract. It was asserted as a defense that plaintiff had negligently failed to perform this contract, thereby causing defendant's horses to suffer and die, with resultant damages. Upon trial by a jury verdict was returned for the plaintiff in the sum of one dollar upon which judgment was entered. Plaintiff appeals asking that this may be reversed.

The material interpleading of the contract, which was in writing, was:

"I propose to Dodge Bauer -[illegible] for you by the month for ten dollars ($10.00) per month. I to furnish all veterinary services [illegible] and all necessary medicine."

This was signed by the plaintiff and accepted in writing by the defendant.

We are of the opinion that this contract calls for the personal services of the plaintiff, and that the property would free from the [illegible] of the time the plaintiff had not [illegible] but sent premiums from a school in which he was an instructor; that at least three horses, during the last four months of the contract, to which period the court restricted evidence

of mistreatment, died because of negligence in the medical treatment. One horse was taken sick with colic, and, although repeatedly requested to give it attention, neither the plaintiff nor any of his assistants responded to the request; the horse died. There was evidence also of another similar case where the plaintiff failed to attend upon a sick horse which subsequently died. Expert testimony by medical men was given tending to show the proper treatment in such cases, from which the jury properly could have inferred that with such treatment the horses could have been saved. There was also another horse which had been sick for four or five months with a disease which subsequently proved to be glanders. During this time plaintiff did nothing for the horse, and did not inform defendant as to the character of the disease. There was evidence tending to show that glanders is a fatal disease and very infectious. Under the statute relating to animals, chapter 8, veterinary surgeons are required to report all cases of glanders, and horses suffering from this disease are shot. Plaintiff, through his assistant, did not isolate the glanders horse from the other horses in the barn, and it was permitted to drink water out of the trough with others and to be stalled near to valuable black horses. No report of the case was made to the state veterinary by the plaintiff. Subsequently the horse was shot by orders of the state veterinary department because he was suffering from glanders, and also the two other black horses which had been stalled near him.

We are of the opinion that there was abundant evidence to sustain defendant's claim of recoupment.

The abstract does not clearly inform us as to whether defendant filed a claim of set-off or of recoupment,

of mistreatment, died because of negligence in the medical treatment. One horse was taken sick with colic, and, although repeatedly requested to give it attention, neither the plaintiff nor any of his assistants responded to the request; the horse died. There was evidence also of another similar case where the plaintiff failed to attend upon a sick horse which subsequently died. Expert testimony by medical men was given tending to show the proper treatment in such cases, from which the jury properly could have inferred that with such treatment the horses could have been saved. There was also another horse which had been sick for four or five months with a disease which subsequently proved to be glanders. During this time plaintiff did nothing for the horse, and did not inform defendant as to the character of the disease. There was evidence tending to show that glanders is a fatal disease and very infectious. Under the statute relating to animals, chapter 8, veterinary surgeons are required to report all cases of glanders, and horses suffering from this disease are shot. Plaintiff, through his assistant, did not isolate the glanders horse from the other horses in the barn, and it was permitted to kick water out of the trough with others and to be stalled near healthy other horses. No report of the case was made to the state veterinary by the plaintiff. Subsequently the horse was shot by order of the state veterinary department because he was sick, or from glanders, and also the two other black horses which had been stalled near him.

We are of the opinion that there was sufficient evidence to sustain defendant's claim of recoupment.

The abstract does not clearly inform us as to whether defendant filed a claim of set-off or of recoupment,

and we shall therefore assume the propriety of the judgment for one dollar. In any event, we would not reverse for a technical error in so small an amount.

The judgment is affirmed.

AFFIRMED.

and we shall therefore assume the propriety of the judgment for one dollar. In any event, we would not reverse for a technical error in so small an amount.

The judgment is affirmed.

AFFIRMED.

316 - 22750

CITY ENGINEERING CONSTRUCTION COMPANY, a corporation,
Appellant,

vs.

FRANK LOEFFLER and WILLIAM E. McCARTHY,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

204 I.A. 430

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendants claiming damages by reason of an alleged breach by defendants of a contract. Upon trial by the court a finding was entered for the defendants, and judgment thereon, from which plaintiff appeals.

The parties entered into a contract on April 16, 1914, whereby the plaintiff undertook to erect for the defendants certain flat and store buildings in Chicago. The plaintiffs also undertook to procure for the defendants building loans in a considerable amount. The question upon the trial was whether the plaintiff was ready and able to furnish and procure the loans to defendants as provided by the contract.

We are of the opinion that the trial court was justified in concluding that plaintiff had failed to prove its readiness and ability to procure these loans. There was evidence of an attempt by the plaintiff to secure the loans from the Mid City Bank, and there were negotiations with its real estate loan manager to this end. We think it is apparent that the manager was willing to make the loans, but he testified - and it is not in dispute - that Mr. Rathje, the president of the bank, had full and complete authority

316 - 25750

CITY NATIONAL BANK AND TRUST COMPANY, a corporation, Appellant,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
FRANK LOEWENKE and ELLIA A. McCARTHY, Appellees.	

MR. PRESIDING JUSTICE McCUNTRY

DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendants claiming damages by reason of an alleged breach of defendants of a contract. Upon trial by the court a finding was entered for the defendants, and judgment thereon, from which plaintiff appeals.

The matter involved here is a contract on April 16, 1924, whereby the plaintiff undertook to erect for the defendants certain flat and store buildings in Chicago. The plaintiffs also undertook to procure for the defendants a building loan in a considerable amount. The transaction upon the trial was whether the plaintiff had [illegible] furnish the defendants the loans as stipulated in the contract by the contract.

In spite of the opinion of the trial court we [illegible] satisfied in a [illegible] that plaintiff [illegible] its readiness and ability to perform [illegible]. There was evidence of an attempt by the plaintiff to secure [illegible] from the City Bank, and [illegible] real estate loan manager to [illegible] on. [illegible] parent that the manager was willing to make the loan, [illegible] he testified - and it is not in dispute - [illegible] the president of the bank, and full and [illegible]

upon the subject. Mr. Rathje testified unequivocally that he had rejected the application for these loans; that he did have some talk about them and gave consideration to the matter, but his final and definite conclusion was that the bank would not make the loans.

Plaintiff did not attempt to make any other showing as to its ability to secure the loans, and as it clearly failed to prove its readiness, willingness and ability to perform this part of its contract, it is not entitled to recover damages because of any alleged breach by the defendants.

The judgment is right and is affirmed.

AFFIRMED.

upon the subject. Mr. Smith testified unequivocally that he had rejected the application for these loans; that he did have some talk about them and gave consideration to the matter, but his final and definite conclusion was that the bank would not make the loans.

Plaintiff did not attempt to make any other showing as to its ability to secure the loans, and as it clearly failed to prove its readiness, willingness and ability to perform this part of its contract, it is not entitled to recover damages because of any alleged breach by the defendants.

The judgment is right and is affirmed.

AFFIRMED.

319 - 22753

THE STANDARD BREWERY,
a corporation,
Appellee,

vs.

PATRICK I. CREEDON,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Complainant, Standard Brewery, filed its bill seeking to have reformed or canceled its alleged guaranty of the covenants of a lease, and to enjoin the prosecution of a suit at law thereon brought by the defendant, Patrick I. Creedon, and for general relief. The defendant answered and filed his cross-bill setting up the guaranty and praying for damages thereunder, to which complainant answered. After hearing by the chancellor on the issues thus formed it was decreed that the guaranty be canceled, the complainant discharged from all obligations thereunder, and the defendant was perpetually enjoined from the prosecution of the pending suit or any other on said guaranty. Defendant by this appeal asks that this decree be reversed.

The facts are not seriously in dispute. On April 12, 1903, Alphonso L. Creedon, the owner of certain property in Chicago, entered into a written contract with the Harugari Maennerchor Society (hereinafter called the society) for the leasing of said premises. By one of the provisions of the contract "the said party of the first part (Creedon) further agrees to lease the aforesaid premises including all improvements, to the said second party (the society) for a period of

319 - 22753

THE STANDARD BREWERY,
a corporation,
Appellee,

vs.

PATRICK I. CREEDON,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE MOSURELY
DELIVERED THE OPINION OF THE COURT.

Complainant, Standard Brewery, filed its bill seeking to have reformed or cancelled its alleged guaranty of the covenants of a lease, and to enjoin the prosecution of a suit at law thereon brought by the defendant, Patrick I. Creedon, and for general relief. The defendant answered and filed his cross-bill setting up the guaranty and praying for damages thereunder, to which complainant answered. After hearing by the chancellor on the issues thus formed it was decreed that the guaranty be cancelled, the complainant discharged from all obligations thereunder, and the defendant was perpetually enjoined from the prosecution of the pending suit or any other on said guaranty. Defendant by this appeal asks that this decree be reversed.

The facts are not seriously in dispute. On April 12, 1903, Alphonso I. Creedon, the owner of certain property in Chicago, entered into a written contract with the Hungarian Mennercher Society (hereinafter called the society) for the leasing of said premises. By one of the provisions of the contract "the said party of the first part (Creedon) further agrees to lease the aforesaid premises including all improvements, to the said second party (the society) for a period of

twenty years." The annual rental was fixed "for the first two years of said period, and $1,800.00 per annum for the remaining 18 years * * except as hereinafter otherwise provided." Further the contract provides "that the rental value of the premises herein described shall be estimated at the close of each and every five-year period during the entire term of this agreement, said estimate to be made by a Board," one member to be named by each of the parties, who, if unable to agree upon the rental value, should name a third member of the Board, and a majority should determine the rental value. It was also further provided that the society should furnish a surety "guaranteeing the payment of the rents to accrue under this agreement for the first five-year period thereof," and if the lessor demanded a surety for the second five-year period the society agreed to furnish it. The guaranty in question before us is the one executed by the complainant for the first five-year period pursuant to this provision of the contract.

By a further provision it was agreed that a lease should be entered into between the parties to the agreement at the commencement of each five-year period.

Pursuant to this contract Alphonso Creedon executed a lease of the premises to the society for a period of five years, which was on one of the printed forms in common use in Chicago, and contained among other things a covenant that "at termination of this lease, by lapse of time or otherwise, to yield up immediate possession to said party of the first part, and failing so to do, to pay as liquidated damages, for the whole time such possession is withheld, the sum of ten ($10) dollars per day"; and at the same time the complainant, the Standard Brewery, signed a guaranty of performance, as follows:

twenty years." The annual rental was fixed "for the first two years of said period, and $1,800.00 per annum for the remaining 18 years * * except as hereinafter otherwise provided." Further the contract provides "that the rental value of the premises herein described shall be estimated at the close of each and every five-year period during the entire term of this agreement, and estimate to be made by a Board," one member to be named by each of the parties, who, if unable to agree upon the rental value, should name a third member of the Board, and a majority should determine the rental value. It was also further provided that the society should furnish a surety "guaranteeing the payment of the rents to accrue under this agreement for the first five-year period thereof," and if the lessor demanded a surety for the second five-year period the society agreed to furnish it. The guaranty in question before us is the one executed by the complainant for the first five-year period pursuant to this provision of the contract.

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> "We hereby guarantee the payment of the rent and the performance of the covenants by the party of the second part in the within lease covenanted and agreed, in manner and form as in said lease provided."

It is under this guaranty that it is sought to recover from the complainant the amount of damages imposed under the lease upon the society in the event it did not yield possession at the termination of this lease. The rental for this first five-year period is not in question, as it was paid by the society.

The first five-year period in the lease referred to expired by its terms on July 31, 1908, and the parties began negotiations as to the rental to be paid by the society for the second five-year period under the terms of the twenty-year contract of April 12, 1903. Each party appointed appraisers, who were not able to agree either as to the rental value or upon a third appraiser. The society continued in the possession of the premises.

In November, 1908, Patrick I. Creedon, the defendant herein, became the owner of the premises, and in November, 1909, instituted proceedings in the Municipal Court of Chicago in forcible detainer against the society to recover possession of the premises. The society then filed a bill in chancery in the Circuit Court seeking to have the rental value for the second five-year period fixed by the court, and to enjoin the prosecution of the suit for possession. Both the Creedons were defendants to this bill, and Patrick Creedon filed a cross-bill thereto. The Standard Brewery, complainant in the case at bar, was not a party to that suit. A decree was entered in that case in which the rental value for the second five-year period was fixed; this would be from August, 1908, to July 31, 1913. The society was ordered to pay the Creedons the amount found due, and upon its failure so to do that the contract would be canceled. The society failed to comply with

> "We hereby guarantee the payment of the rent and the performance of the covenants by the party of the second part in the within lease covenanted and agreed, in manner and form as in said lease provided."

It is under this guaranty that it is sought to recover from the complainant the amount of rentals increased upon the lease upon the society in the event it did not yield possession at the termination of this lease. The rental for the first five-year period is not in question, as it was paid by the society.

The first five-year period in question terminated to expire by its terms on July 1, [illegible]. The parties began negotiations as to the rental to be paid by the society for the second five-year period under the terms of the twenty-year contract of April 1, 1905. The society maintained appellants, who were not also in [illegible] interest in the rental value or were a third guarantor. The society continued in the possession of the premises.

In [illegible], [illegible] [illegible], became the owner of the property, and [illegible], instituted proceedings in the Municipal Court of [illegible] to recover possession of the premises. The society then filed a [illegible] in the District Court [illegible] the second five-year period [illegible] the prosecution of [illegible] proceeding. [illegible] was dismissed in [illegible], [illegible] cross-bill [illegible]. [illegible] the case at bar, was [illegible] [illegible] answered in [illegible] five-year period [illegible] to July 31, 1910. [illegible] the amount found due, and upon its [illegible] contract would be increased. [illegible]

this decree, and on October 26, 1915, a further decree was entered canceling the contract and giving the possession of the premises to Creedon.

Thereafter the defendant, Patrick I. Creedon, brought suit in the Municipal Court against the complainant to recover the sum of $10 per day from the first day of August, 1903, to the 31st day of July, 1908, which was the second five-year period above referred to, under the above mentioned covenant of the lease and the guaranty. Thereupon the complainant filed the bill of complaint in the case at bar.

By the decree before us the chancellor found that the society remained in possession of the premises after the first five-year period and after the termination of the lease therefor, by virtue of the twenty-year contract of April 12, 1903, and not under the lease; that the rental under the lease having been paid in full, all obligations under the guaranty had ceased.

The determination of this question depends upon whether or not at the expiration of the first five-year period the possession of the society should be construed as a trespass for which it was liable in damages, or whether it should be considered as a holdover under the twenty-year contract. We are of the opinion that the chancellor was right in holding that the possession was referable to the contract and not to the lease. The contract itself provides for twenty years possession at a fixed minimum rental; there was no controversy at the end of the first five-year period as to the right of the society to remain; the dispute arose as to the amount of excess rental for the second five-year period over the minimum rate provided by the contract.

A further consideration is that Alphonso L. Creedon took a bond as security for the rents from one Fritz Nebel,

this decree, and on October 26, 1918, a further decree was entered cancelling the contract and giving the possession of the premises to Gresdon.

Thereafter the defendant, Frederick L. Gresdon, brought suit in the municipal court against the complainant to recover the sum of [illegible] per day from the first day of August, 1906, to the 31st day of July, 1909, which was the second five-year period above referred to, under the above mentioned covenant of the lease and [illegible]. Thereupon the complainant filed the bill of complaint in the case at bar.

By the decree before us the chancellor found that the society received [illegible] possession of the premises after the first five-year period and before the termination of the lease thereafter, by virtue of the twenty-year contract of April 19, 1906, and not under the lease; that [illegible] under the lease having been paid in full, nothing was due under the covenant and [illegible].

The determination of this question depends upon whether or not the expiration of the first five-year period [illegible] the possession of the society [illegible] a [illegible] for which it was liable in damages, or whether it should be considered as a holdover under the twenty-year contract. [illegible] are of the opinion that [illegible] the lease [illegible] that the [illegible] to the lease. [illegible] possession [illegible] fixed [illegible] the end of the first five-year period [illegible] the society [illegible] the [illegible] excess rental for the second five-year period [illegible] rate provided by the contract.

[illegible] Gresdon [illegible] that [illegible] took a bond [illegible] for the rental from one [illegible],

which was taken over by the defendant as security for the rents for the second five-year period. This was a bond given to secure the payment of rents under the contract or under any lease that might be given pursuant thereto. Under such circumstances it cannot be reasonably claimed that the society did not owe rents for the second five-year period as a tenant but did owe damages as a trespasser.

It also should be noted that not only did defendant accept this bond but brought suit thereon for the amount of rents for the very period for which he claims the complainant is liable. His suit was against the society as principal and against Nebel as surety. On account of an error in the language of the bond, which referred to the contract by a mistaken date, he filed a bill in chancery in which he alleged that he was entitled to recover from the society, his tenant, and from the surety on the bond, for the rents during this second period, it being alleged that the bond was given to secure rents for the second five-year period.

In the decree in the Circuit Court case the rental value of the premises for the second five-year period was fixed. There was no claim made by the defendant in that suit for any damages from the society by reason of its remaining in possession after the termination of the first lease. The court also found that there was a liability on the part of the society to pay the rental for the full second five-year period and decreed that the amount of rent should be paid by the society. Not only was there a recovery had for rents, but it also appears by the decree that $4,000 was paid in installments and turned over to the defendant on account of rents. This, having been accepted on account of rents, cannot now be deemed as payment of liquidated damages. Part of this was collected by the defendant directly from the society,

which was taken over by the defendant as security for the rents for the second five-year period. This was a bond given to secure the payment of rents under the contract or under any leases that might be given pursuant, therefore, under such circumstances it cannot be reasonably claimed that the society did not use rents for the second five-year period as a tenant but did owe them as a creditor.

It also should be noted that not only did defendant accept this bond but brought suit thereon for the amount of rents for the very period for which he claim the repudiation is liable. His suit was against the society as principal and against [illegible] surety. In consent of an error in the language of the bond, which referred to the [illegible] by a mistaken date, he filed a bill in chancery in which he alleged that he was entitled to recover from the surety, his tenant, and from the surety on the bond, for the rents during the second period, it being alleged that the bond was given to secure rents for the second five-year period.

In the decree in the chancery suit [illegible] the actual value of the premises for the second five-year period was fixed. There was no claim made by the defendant [illegible] for any damage from the society by reason of its refusing in possession [illegible] the court also found that there was a liability on the part of the society to pay [illegible] period an increased [illegible] the society. [illegible] rents. This, having been accepted [illegible] now be denied as payment of liquidated damages. [illegible] was collected by the defendant directly from the society.

then in possession, as payment of rent, so that the defendant recognized the society as a tenant after the first five-year period, has collected some of the rent and has a judgment for the balance.

Many other considerations might be noted, but the above are sufficient to lead to the conclusion that the society was not a trespasser in continuing in possession of the premises, but was in law and fact a tenant. Among the cases supporting this view are Eichorn v. Peterson, 16 Ill. App. 601; Dunne v. Trustees, 39 Ill. 578; Madlung v. Jackson, 172 Ill. App. 60; Weber v. Powers, 213 Ill. 370; Kenwood Hotel Co. v. Hiland, 153 Ill. App. 108; Espert v. Carmichael Range Co., 152 Ill. App. 185; Standard v. Kuhn, 132 Ill. App. 466; Goldsborough v. Cable, 140 Ill. 269, and Kelso v. Crilly, 85 Ill. App. 568. This last case is directly in point. See, also, Taylor's Landlord & Tenant, sec. 22, where the author says with reference to the conduct of a landlord after the termination of a lease: "Very slight acts on the part of the landlord, or a short lapse of time, are sufficient to * * make the occupant his tenant"; and this is quoted with approval in Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151.

This view of the case makes it unnecessary to decide whether or not the contract of April 12, 1903, should be considered a lease or a contract for a series of leases. Whatever elements necessary to a lease may be lacking in this instrument do not readily occur to us; in any event it was the instrument under which the society remained in possession, and which, coupled with the conduct of the parties, fixes the character of the possession ofnthe society.

In view of the appearance, answer and cross-bill of the defendant in the chancery proceeding and the allegations therein made, we are not persuaded that there is merit in

then in possession, on payment of rent, so that the defendant recognized the society as a tenant after the first five-year period, has collected some of the rent and has a judgment for the balance.

Many other considerations might be noted, but the above are sufficient to lead to the conclusion that the society was not a trespasser in continuing in possession of the premises, but was in law and fact a tenant. Among the cases supporting this view are Gibson v. Patterson, 16 Ill. App. 601; Dunne v. Turpies, 30 Ill. 578; Wadham v. Jackson, 172 Ill. App. 60; Baker v. Powers, 212 Ill. 372; Norwood Hotel Co. v. Hilard, 152 Ill. App. 108; Hagert v. Continental Lumber Co., 152 Ill. App. 185; Stanford v. Kuhn, 132 Ill. App. 466; Goldsborough v. Cable, 110 Ill. 266, and Kelso v. Jolliff, 88 Ill. App. 568. This last case is directly in point. See, also, Taylor's Landlord & Tenant, sec. 77, where the author says with reference to the conduct of a landlord after the termination of a lease: "Very slight acts on the part of the landlord, or a short lapse of time, are sufficient to * * make the occupant his tenant"; and this is quoted with approval in Glinton Fire Cloth Co. v. Gardner, 76 Ill. App. 171.

This view of the case makes it unnecessary to decide whether or not the contract of April 16, 1943, should be construed a lease or a mere at-will tenancy of lessee. Whatever elements there may be in a lease may be lacking in this instrument do not readily occur to us; in any event it was the instrument under which the society remained in possession, and which, coupled with the conduct of the parties, fixes the character of the possession which they had.

In view of the appearance, answer and cross-bill of the defendant in the chancery proceeding and the allegations therein made, we are not persuaded that there is merit in

the claim of counsel for the defendant that there was no issue made by the pleadings.

The court was called upon to determine the character of the occupancy of the premises after the expiration of the lease, and whether or not there was any liability of the complainant to the defendant. Upon the entire record we are of the opinion that the decree was properly deducible from the evidence before the chancellor, and it is affirmed.

AFFIRMED.

the claim of counsel for the defendant that there was no issue made by the pleadings.

The court was called upon to determine the character of the occupancy of the premises after the expiration of the lease, and whether or not there was any liability of the complainant to the defendant. Upon the entire record we are of the opinion that the decree was properly deducible from the evidence before the chancellor, and it is affirmed.

AFFIRMED.

326 - 22760

THOMAS TAGNEY, for use of
FLORENCE BRISCOE,
Appellee,

vs.

JAMES A. TABOR,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

204 I.A. 440

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment for rent by confession on a lease executed by defendant, who thereupon moved the court to have the judgment opened and for leave to defend. This motion was denied, and defendant appeals.

The affidavit filed in support of the motion alleged the misconduct of another tenant in the building in which was the apartment leased by the defendant. This cannot be considered as a constructive eviction by the landlord, and cases cited where the conduct of the landlord was held to amount to an eviction are not in point. It cannot be said that the landlord in the present instance created a nuisance upon the premises; in fact, as appears from the affidavit, when the matter was called to his attention he promised to see what he could do to remedy conditions. However, the improper conduct of another tenant recited in the affidavit cannot be charged to the landlord.

There is no merit in the claim as to difference of date in the statement of claim and of the lease.

The motion was directed to the discretion of the court, and we cannot say that this has been abused. The order and judgment of the trial court are affirmed.

AFFIRMED.

326 - 22760

THOMAS TAGNEY, for use of
FLORENCE BRISCOE,
Appellee,

vs.

JAMES A. TASON,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment for rent by confession on a lease executed by defendant, who thereupon moved the court to have the judgment opened and for leave to defend. This motion was denied, and defendant appeals.

The affidavit filed in support of the motion alleged the misconduct of another tenant in the building in which was the apartment leased by the defendant. This cannot be considered as a constructive eviction by the landlord, and cases cited where the conduct of the landlord was held to amount to an eviction are not in point. It cannot be said that the landlord in the present instance created a nuisance upon the premises; in fact, as appears from the affidavit, when the matter was called to his attention he promised to see what he could do to remedy conditions. However, the improper conduct of another tenant recited in the affidavit cannot be charged to the landlord.

There is no merit in the claim as to difference of date in the statement of claim and of the lease.

The motion was directed to the discretion of the court, and we cannot say that this has been abused. The order and judgment of the trial court are affirmed.

AFFIRMED.

329 - 22763

SAMUEL HECHT,
Appellee,

vs.

HARRY J. GOLDBERG and JACOB STEIN, trading as Goldberg & Stein,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

204 I.A. 441

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for wages under a contract of employment with the defendants; upon trial by the court he had judgment for $105. Defendants seek a reversal.

From the evidence the court could properly find that in June, 1915, plaintiff took employment with the defendants as a designer of women's garments at a salary of $30 a week; that he was promised an increase as soon as orders commenced to come in on the designs made by him; that he worked for defendants about three months when he received an offer of another job at higher wages, with steady work; that he reported this to defendants, who thereupon promised to pay him $35 a week, and also that he would be kept until after New Year's. This was in September; he remained with defendants under these promises until October 23rd, when he was discharged by them, just at the time when all his designs for the season had been finished. He was told to come back in case he could not find other employment. He was without employment for six or seven weeks after being discharged.

There is no merit in the contention of defendants' counsel concerning the pleadings. It has been many times held that precision and exactness of statement are not required in 4th class cases. Hopkins v. Levandowski,

SAMUEL HUCKT,
Appellee,

vs.

HARRY J. GOLDBERG and JACOB STEIN, trading as Goldberg & Stein,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for wages under a contract of employment with the defendants; upon trial by the court he had judgment for $105. Defendants seek a reversal.

From the evidence the court could properly find that in June, 1915, plaintiff took employment with the defendants as a designer of women's garments at a salary of $30 a week; that he was promised an increase as soon as orders commenced to come in on the designs made by him; that he worked for defendants about three months when he received an offer of another job at higher wages, with already work; that he reported this to defendants, and thereupon promised to pay him $35 a week, and he was told he would be kept until after New Year's. This was in September; he remained with defendants under these promises until October 23rd, when he was discharged by them, just as he had given all his designs for the season had been finished. He was told to come back in one week and that there would employment. He was without employment for six or eight weeks after being discharged.

There is no merit in the contention of defendants' counsel concerning the pleadings. It has been many times held that pretension and exactness of averment are not required in 4th class cases. Hopkins v. Dovendowski,

250 Ill. 372; Nonotuck Silk Co. v. Adams Express Co., 256 Ill. 66.

Counsel for plaintiff makes some suggestion that the amount of the judgment was erroneously fixed at $105 instead of $210. The judgment is in the amount stated in plaintiff's affidavit supporting his statement of claim. We do not find in the record any motion to increase the ad damnum.

Under the evidence and the law the judgment should not be disturbed, and it is affirmed.

AFFIRMED.

250 Ill. 372; Monotuck Silk Co. v. Adams Express Co., 256 Ill. 66.

Counsel for plaintiff makes some suggestion that the amount of the judgment was erroneously fixed at $105 instead of $210. The judgment is in the amount stated in plaintiff's affidavit supporting his statement of claim. We do not find in the record any motion to increase the ad damnum.

Under the evidence and the law the judgment should not be disturbed, and it is affirmed.

AFFIRMED.

337 - 22771

CARRIE TINTEL, MARY A. KAUTH,
MINNIE B. EISNER, ANNA TINTEL,
EMMA A. TINTEL and BIRDIE TINTEL,
Appellees,

vs.

A. W. GORKE,
Appellant.

APPEAL FROM COUNTY COURT,
COOK COUNTY.

204 I.A. 442

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiffs had judgment against the defendant for $244.65 from which defendant appeals.

It is an action brought by the heirs and next of kin of C. H. Tintel, deceased, to recover money due from defendant for goods sold and delivered by C. H. Tintel during his lifetime. The declaration alleged that before the commencement of the suit Tintel had died; that a complete administration was had of his estate in the state of Wisconsin, where he had resided at the time of his death; that all debts of deceased and claims allowed against his estate and all expenses of administration, were fully paid by the administratrix, Minnie B. Tintel, now Minnie B. Eisner, one of the plaintiffs, and that the balance of said estate was distributed among the plaintiffs; that said indebtedness sued on was part of the assets of said estate so distributed and turned over to the plaintiffs, as the only heirs at law and next of kin of said deceased, and that said estate was thereupon closed and said administratrix discharged before the commencement of the suit. To this declaration defendant filed a demurrer which was overruled by the court, and the defendant, electing to stand by his demurrer, appeals.

Counsel agree that the only question submitted

327 - 327V1

CARRIE TIRTEL, MARY A. KAUTH, ELDRIE B. KLEMZ, ANNA TIRTEL, EDNA A. TIRTEL and EIRDIE TIRTEL, Appellees,	APPEAL FROM COOK COUNTY COURT.
vs.	COOK COUNTY.
A. W. COUNE, Appellant.	

MR. MEMORANDUM JUSTICE MORGANEY

DELIVERED THE OPINION OF THE COURT.

Appellees have judgment against the defendant for $2,000.00 from which defendant appeals.

It is an action brought by the heirs and next of kin of C. J. Tirtel, deceased, to recover money due from defendant for goods sold and delivered by J. J. Tirtel during his lifetime. The declaration filed on behalf before the commencement of the suit filed in the court contains no ad interrestion was and of his estate in the county of Cook county. It is not disputed at the time of the death that all debts of deceased and claims against his estate and all expenses of administration, were fully paid by the administrator, Hindle . Tirtel , now Hindle . Tirtel, one of the plaintiffs, and that [illegible] distributed among the plaintiffs; that [illegible] on was part of the assets of said estate [illegible] turned over to the plaintiffs, in the only [illegible] next of kin of said deceased, and that said [illegible] upon closed [illegible] administrator [illegible] memorandum of the suit. To this [illegible] defendant [illegible] evidence [illegible] electing to [illegible] [illegible].

Counsel argue that the only [illegible]

for decision is whether the heirs at law and next of kin of the deceased can, after complete administration, maintain an action for the recovery of a claim upon contract, due to the deceased in his lifetime for goods sold and delivered, where such claim was turned over to the heirs at law and next of kin as part of their distributive share in said estate. Defendant bases his contention that this cannot be done upon the decision in McLean County Coal Co. v. Long, 91 Ill. 617. We are of the opinion, however, that this case is not in point. In the case cited John Long in his lifetime sued the coal company to recover for a quantity of coal it had mined and removed from land belonging to him; he recovered a judgment which was subsequently reversed and the cause remanded. Before the case was redocketed in the court below Long died, having by will devised all his property to Honora Long. Neither she nor any other person ever became executor or administrator of Long's estate, no steps being taken in the Probate Court for that purpose. The case was redocketed, the death of Long suggested, and leave given to amend the declaration, which was done by making Honora Long plaintiff, and the case progressed in her name. The Supreme Court decided that the plaintiff had no right without obtaining letters in the estate to maintain the action.

Jacques v. Ballard, 111 Ill. App. 567, is the case of an executrix bringing suit individually upon a note payable to the order of her testator, which had not been endorsed by him and was not before the settlement of the estate endorsed by the executrix. It was held that under our statute the note should have been endorsed by the plaintiff, as executrix, and that without this she could not individually acquire legal title to it.

for decision is whether the heirs at law and next of kin of the deceased can, after complete administration, maintain an action for the recovery of a claim upon contract, due to the deceased in his lifetime for goods sold and delivered, where such claim was turned over to the heirs at law and next of kin as part of their distributive share in said estate. Defendant bases his contention that this cannot be done upon the decision in Mohawk County Coal Co. v. Long, 21 Ill. 617. We are of the opinion, however, that this case is not in point. In the case cited John Long in his lifetime sued the coal company to recover for a quantity of coal it had mined and removed from land belonging to him; he recovered a judgment which was subsequently reversed and the cause remanded. Before the case was remanded in the court below Long died, having by will devised all his property to Honora Long. Neither she nor any other person ever became executor or administrator of Long's estate, no steps being taken in the Probate Court for that purpose. The case was docketed, the death of Long noted, and leave given to amend the declaration, which was done by making Honora Long plaintiff, and the case proceeded in her name. The Supreme Court decided that the plaintiff had no right without obtaining letters in the estate to maintain the action. Lagrange v. Hilliard, 111 Ill. [illegible]. But, in the case of an executrix [illegible] payable to the order of her testator, [illegible] not been endorsed by him and was not [illegible] the property of the estate endorsed by the executrix. It was [illegible] that an executrix, as executrix, and that without this [illegible] not [illegible] require legal title to it.

In Leamon v. McCubbin, 82 Ill. 263, the court held that under our statute the personal estate, after payment of debts, is to descend to and be distributed among the heirs, but that this distribution must be effected through due administration in the proper court.

We can see no reason why plaintiffs may not maintain their action in the cause before us. We have here a complete administration, all the debts and claims paid, a distribution of the assets and a discharge of the administratrix. The account sued on has been completely administered, and the legal title thereto has been properly transferred to plaintiffs by order of distribution. Having become properly vested with the legal title, we can see no reason why they should not be considered as the proper parties to bring an action in the cause. Cases in other jurisdictions supporting this view are Wooten v. Steele, 98 Ala. 252; Suit v. Crawford, 100 Ky. 355; Humphreys v. Keith, 11 Kas. 108, and Pratt v. Pratt, 22 Minn. 148.

The judgment is affirmed.

AFFIRMED.

In Lawson v. McGlynn, 82 Ill. 548, the court held that under our statute the personal estate, after payment of debts, is to descend to and be distributed among the heirs, but that this distribution must be effected through due administration in the proper court.

We can see no reason why plaintiffs are not maintain their action in the course taken. We have here a complete administration, all the debts and claims paid, a distribution of the estate and a decree of the probate-court. The decree has been on file some considerable time, and the legal title to the property vested in the legal heirs, so that there is no reason why they should not be considered as the proper parties to bring an action in the case. Cited in other jurisdictions: Wright v. Wright, 10 Ohio, 267; Hall v. Hancock, 15 Pick. 255; Chamberlain v. Preble, 11 Gray, 305; and Perry v. Jones, 39 Ohio St. 339.

The judgment is affirmed.

Affirmed.

227 - 22658

WILLIAM C. NIBLACK, as Receiver of the LaSalle Street Trust and Savings Bank,
Appellee,

vs.

ABRAHAM L. FELDMAN, MORRIS FELDMAN, NATHAN FELDMAN, partners, trading as Feldman Bros., and ABRAHAM FELDMAN and LOUIS FELDMAN, individually,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff's suit was begun in the Municipal Court against Abraham L. Feldman, Morris Feldman and Nathan Feldman, partners, trading as Feldman Bros., and Abraham L. Feldman and Louis Feldman, individually, on a promissory note for $4,000, dated March 5, 1914, executed by the firm of Feldman Bros. and payable 120 days after date to the order of the LaSalle Street Trust and Savings Bank (referred to hereinafter as the bank), with interest at 7% after maturity until paid. Abraham L. Feldman and Morris Feldman in writing on the back of the note guaranteed the payment of "the within note." Judgment was had against the defendants Abraham L. Feldman and Morris Feldman in the sum of $4,463.42.

Following the execution and delivery of this note, and on May 15, 1914, the bank borrowed the sum of $100,000 from the International Trust Company of Boston (hereinafter referred to as the trust company), to secure the payment of which sum it gave its promissory collateral note dated May 15, 1914, payable 60 days after date, and it also at the same time delivered to the trust company as collateral security for the payment of its said note, notes of

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WILLIAM C. MIRACK, as Receiver of the Lasalle Street Trust and Savings Bank, Appellee,	
vs.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
ABRAHAM L. FELDMAN, MORRIS FELDMAN, NATHAN FELDMAN, partners, trading as Feldman Bros., and ABRAHAM FELDMAN and LOUIS FELDMAN, individually, Appellants.	

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff's suit was begun in the Municipal Court against Abraham L. Feldman, Morris Feldman and Nathan Feldman, partners, trading as Feldman Bros., and Abraham L. Feldman and Louis Feldman, individually, on a promissory note for $4,000, dated March 5, 1914, executed by the firm of Feldman Bros. and payable 120 days after date to the order of the Lasalle Street Trust and Savings Bank (referred to hereinafter as the bank), with interest at 7% after maturity until paid. Abraham L. Feldman and Morris Feldman in writing on the back of the note guaranteed the payment of "the within note." Judgment was had against the defendants Abraham L. Feldman and Morris Feldman in the sum of $4,405.42.

Following the execution and delivery of this note, and on May 15, 1914, the bank borrowed the sum of $100,000 from the International Trust Company of Boston (hereinafter referred to as the trust company), to secure the payment of which sum it gave its promissory collateral note dated May 15, 1914, payable 60 days after date, and it also at the same time delivered to the trust company as collateral security for the payment of its said note, notes of

the face value of $147,000, included among which was the $4,000 note above referred to.

On June 18, 1914, on a petition by the People of the State of Illinois, William C. Niblack was appointed by the Circuit Court of Cook County receiver for the bank, and on the same day, by order of court, the bank was dissolved and the receiver was directed to proceed to convert into money all of its property and assets.

On July 14, 1914, the Circuit Court, on the petition of the receiver, entered an order of record, a copy of which order is as follows:

> "That said receiver, out of the funds in his hands as such receiver, be authorized to purchase from said International Trust Company of Boston the said promissory note for One Hundred Thousand ($100,000) Dollars mentioned in said petition, and also said other indebtedness amounting to about Eight Thousand ($8,000) Dollars, and secure possession of said collateral notes and bonds mentioned therein, if, in his judgment, in case he should make such purchase, he will be able to realize from said collateral notes and bonds a sum more than sufficient to pay the amount due said International Trust Company of Boston from said LaSalle Street Trust and Savings Bank, and for which it holds said collateral notes and bonds as securities.
>
> "That said receiver, in case he makes such purchase and secures possession of said collateral notes and bonds, collect or otherwise convert the same into money, so far as the same may be collectible, and out of the proceeds thereof first restore to the general funds in his hands as such receiver the amount of such funds used to make such purchase from said International Trust Company of Boston and hold the balance of said proceeds as a separate fund subject to the further order of this court, and that all questions of set-offs in favor of the makers of said collateral notes and all other claims in respect to said collateral notes, and each of them, be reserved for the further consideration and determination of this court."

Following the entry of this order the receiver paid the sum of $108,000 to the trust company and he secured possession of the said note of the bank for $100,000 and all of the notes and securities which had been delivered to the trust company as collateral security for the payment of this

the face value of $147,000, included among which was the $4,000 note above referred to.

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"That said receiver, in case he makes such purchase and secures possession of said collateral notes and bonds, collect or otherwise convert the same into money, so far as the same may be collectible, and out of the proceeds thereof first restore to the general funds in his hands as such receiver the amount of such funds used to make such purchase from said International Trust Company of Boston and hold the balance of said proceeds as a separate fund subject to the further order of this court, and that all questions of set-offs in favor of the makers of said collateral notes and all other claims in respect to said collateral notes, and each of them, be reserved for the further consideration and determination of this court."

Following the entry of this order the receiver paid the sum of $108,000 to the trust company and secured possession of the said note of the bank for $100,000 and all of the notes and securities which had been delivered to the trust company as collateral security for the payment of the

note.

The firm of Feldman Bros. had on deposit in the bank at the time plaintiff was appointed receiver the sum of $2,377.31. On August 6, 1914, defendants tendered the receiver in cash the sum of $1,646.02, being the difference between the amount Feldman Bros. had on deposit in the bank at that time and the amount due on the said note of $4,000. The receiver refused to accept the sum tendered and refused to surrender the note.

The language of the order of July 14, 1914, is that the receiver "be authorized to purchase from said International Trust Company of Boston the said note for $100,000 * * and secure possession of said collateral notes and bonds." The receiver was authorized to purchase the bank's note of $100,000 and to secure possession of the note payment of which was guaranteed by the defendants. The question, then, to be determined by this court is, was the transaction in the course of which the receiver obtained possession of the $4000 note in question under order of court, a redemption of that note from the lien of the trust company, or did the receiver secure such note as the result of a purchase by him so that it may be said, in the interest of the general creditors of the bank, that the receiver is an endorsee for value and before maturity of such note?

In his petition for the entry of the order of July 14, 1914, the receiver, referring to the pledged notes in the possession of the trust company, among which was the said note of the defendants, stated:

> "If said promissory notes and bonds were in the possession of your petitioner the makers of certain of said notes would be entitled to set-off against same the balances which they respectively had on deposit in said LaSalle Street Trust and Savings Bank at the time of the appointment of your petitioner as receiver thereof, to wit: * * *

note.

The firm of Feldman Bros. had on deposit in the bank at the time plaintiff was appointed receiver the sum of $2,377.31. On August 6, 1914, defendants tendered the receiver in cash the sum of $1,848.02, being the difference between the amount Feldman Bros. had on deposit in the bank at that time and the amount due on the said note of $4,000. The receiver refused to accept the sum tendered and refused to surrender the note.

The language of the order of July 14, 1914, is that the receiver "be authorized to purchase from said International Trust Company of Boston the said note for $100,000 * * and secure possession of said collateral notes and bonds." The receiver was authorized to purchase the bank's note of $100,000 and to secure possession of the note payment of which was guaranteed by the defendants. The question, then, to be determined by this court is, was the transaction in the course of which the receiver obtained possession of the $4000 note in question under order of court, a redemption of that note from the lien of the trust company, or did the receiver simply buy such note in the result of a purchase by him of a fund in the bank, in the interest of the general creditors of the bank, that the receiver in so endorsed for value and before maturity of such note

In his petition for the [illegible] of the owner of July 14, 1914, the receiver, not being [illegible] pledged notes in the possession of the trust company, among which was the said note of the defendants, stated :

"If said promissory notes [illegible] in the possession of your petitioner [illegible] said notes could be entitled to set-off against the balances which they represented [illegible] Lasalle Street Trust and Savings Bank in the [illegible] adjustment of your petitioner's [illegible] to wit: * * *

"Said Feldman Brothers would be entitled to set off a deposit of $2,377.31 against their note of $4,000, leaving a balance due your petitioner as receiver as aforesaid of $1,622.69. * * *

"If said promissory notes and bonds were all in the possession of your petitioner and the same were all collectible, your petitioner would realize therefrom, after allowing all of said set-offs, the sum of $113,208.30."

It is evident that at the time this petition was filed the receiver believed that the defendants would have the legal right to set off the amount of the deposit in the bank against the sum due on the note. No suggestion is made in the petition that the receiver desired or intended to purchase the note of the bank in the hands of the trust company; the defendants were not made parties to the proceedings in the Circuit Court which culminated in the entry of the order in question, and it is difficult to understand how that court, without the actual or constructive presence of defendants in court, could by its order so alter the legal relations of the defendants and the bank, or the receiver, as to so materially affect the liability of the defendants.

The receiver is not solely the representative of either the creditors or the stockholders of the insolvent bank; his position is that of a stakeholder, and he is in possession of the property of the insolvent as an officer of the court; his control of the affairs of the insolvent and his possession of its property is not for the sole benefit of any special class of claimants or creditors, but may be said to be in the interest of and for the benefit of any and every person who may have a legal interest in an honest and efficient control and distribution of its assets.

In Young v. Stevenson, 180 Ill., on page 614, the court, referring to the powers of a receiver, said:

"Said Fulham Brewery should be entitled to set off a deposit of $2,277.81 against their note of $4,000, leaving a balance due your petitioner as receiver as aforesaid of $1,822.19. * * *

"If said promissory notes and bonds were all in the possession of your petitioner and the same were all collectible, your petitioner would realize therefrom, after allowing all of said set-offs, the sum of $[illegible]."

It is evident that at the time this petition was filed the receiver believed that the defendants would have the legal right to set off the amount of the deposit in the bank against the sum due on the note. No suggestion is made in the petition that the receiver desired or intended to purchase the note of the bank in the hands of its trust company; the defendants were not made parties to the proceedings in the Circuit Court which culminated in the entry of the order in question, and it is difficult to understand why that court, without the actual or constructive presence of defendants in court, could by its order so alter the legal relations of the defendants and the bank, or the receiver, as to so materially affect the liability of the defendants.

The receiver is not solely the representative of either the creditors or the stockholders of the insolvent bank; his position is that of a stakeholder, and he is in possession of the property of the insolvent as a trustee [illegible]; his control of the affairs of the insolvent and its possession of its property is not for the sole benefit of any [illegible] class of claimants or creditors, but [illegible] in [illegible] interest of and [illegible] the benefit of every [illegible] who may have a legal interest in an honest and [illegible] distribution of the assets.

In Ziegler v. Stevenson, 10 [illegible], [illegible] court, referring to the powers of a receiver, [illegible]:

"They are, therefore, such, only, as are conferred by courts of equity, under their equitable jurisdiction, upon receivers appointed by such courts. As receiver he represents the corporate body and not the shareholders."

In High on Receivers, 4th Ed., sec. 134, p. 153, the author says:

"The general proposition is well established that, the receiver being the officer or agent of the court from which he derives his appointment, his possession is exclusively the possession of the court, the property being regarded as in the custody of the law, in gremio legis, for the benefit of whoever may be ultimately determined to be entitled thereto."

It was not only the right but also it was the duty of the receiver to redeem the notes deposited as collateral for the payment of the bank's note; if the facts were as alleged in the receiver's petition he would have added materially to the bank's assets by the payment of its note and the redemption of the notes given as collateral security. In the presence of this duty, as asserted by the receiver himself, it would be most inequitable to permit him by a mere form of words used in the order of the court, to change the essential nature of the transaction between himself and the trust company. There is nothing in this record that indicates that the Circuit Court intended by the entry of the order to determine any such question as is presented here; no such issue is raised by the receiver's petition, and we are inclined to the view that the direction to purchase was inserted in the order by inadvertence. Notwithstanding the language of the order, we are inclined to the view that the transaction was in substance a redemption and not a purchase of the note in question, as insisted upon by the plaintiff. The trust company became the pledgee of the note sued on; its possession, under its agreement with the bank, did not vest

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it with complete title in or ownership of the note; this right of possession would, upon the happening of an uncertain event, authorize it in accordance with its agreement with the bank, to sell or dispose of the note, but until the happening of such event its title was special in its nature. Union Trust Co. v. Rigdon, 93 Ill. 467.

We do not agree with the contention of plaintiff that the receiver was an endorsee of the note of defendants for value, merely because he procured the note from the trust company under the order of the court. Legally his possession was that of the corporation whose property it was when pledged, and his rights and obligations with reference thereto must be held to be the same as those of the bank; his right to redeem the note was acquired in the same manner as his right to the possession of the other property and assets of the bank; it became his duty as receiver to assert its, the bank's, right to redeem the note in question, as it was his duty to meet and pay the obligations of the bank so far as permitted by the assets in his hands.

The law does not impose upon receivers the obligation of defeating the just, legal claims of special or lien creditors in the interest of general creditors of the insolvent. It is true, no doubt, that the receiver in the instant case, in the exercise of sound business judgment, thought it advisable to acquire possession of the defendants' note in question in the interest of the general creditors of the bank; and even if it be conceded, as claimed by the plaintiff, that the evidence discloses that the general funds in the hands of the receiver at the time of the trial have not been repaid the amount taken therefrom to make such redemption, this fact in and of itself cannot

it with complete title to or ownership of the [illegible]; this right of possession would, upon the happening of an uncertain event, authorize it in non reliance with its agreement with the bank, to sell or dispose of the [illegible], and upon the happening of such event, its title was absolute in its nature. Union Trust Co. v. Hudson, 92 Ill. 487.

We do not agree with the contention of plaintiff that the receiver was an endorsee of the note of defendants for value, merely because he procured the note from the trust company under the order of the court. Generally his possession was that of the corporation whose property it was when pledged, and his rights and obligations with reference thereto must be held to be the same as those of the bank; his right to return the note was conditioned in the same manner as his right to the possession of the other property and assets of the bank; it became [illegible] as receiver to assert its, and finally, right to return the note in question, as in the [illegible] and pay the obligations of the bank as far as [illegible] by the funds in his hands.

The law [illegible] of issues [illegible] disposition of defrauding the [illegible] [illegible] lien creditors in the interest [illegible] of the involved. It is true, [illegible] in the instant case, in the [illegible] [illegible] pledgee in [illegible] the defendants' note in question in the interest of the general creditors of the bank; and even if it [illegible] claimed by its plaintiff. [illegible] the general funds in the hands of the receiver [illegible] of the trial have not been regard the [illegible] to make such redemption, the fact is [illegible]

change the inherent character of the transaction or the legal relations of the parties.

If it be the law that the receiver's possession of the property and assets of the insolvent is for the benefit of every person having an interest in a proper administration of his trust, it is difficult to find a reason why, as a consequence of his appointment as receiver, such appointment should vest in him a power which could not have been exercised by the insolvent corporation had no receiver been appointed. Clearly in the absence of such appointment or of the bank's insolvency, the bank would not be permitted by law to deny a legal right of set-off by calling an actual redemption of collateral notes deposited by it with a creditor, a purchase, and we can see no sufficient reason why under substantially similar conditions such privilege should be accorded a receiver.

Under the terms of the collateral note the bank had the right to redeem the notes deposited with the trust company as security for the loan; the trust company, on default of the bank, could have sold such notes, and in that event it would have been its duty to credit the amount received therefor as a payment on the note of the bank; the right of the bank was to redeem, and the right of the trust company was to sell on default of the bank. The receiver, on his appointment as such, stood in the place of the bank; he sought to avoid a compliance with the terms of the collateral note by procuring the entry of an order of court which authorized him to purchase the note in question. We are of the opinion that on the facts disclosed by this record this transaction should be held to be a redemption and not a purchase of the note.

change the inherent character of the transaction or the legal relations of the parties.

If it be the law that the receiver's possession of the property and assets of the insolvent is for the benefit of every person having an interest in a proper administration of his trust, it is difficult to find a reason why, as a consequence of his appointment as receiver, such appointment should vest in him a power which could not have been exercised by the insolvent corporation had no receiver been appointed. Clearly in the absence of such appointment or of the bank's insolvency, the bank would not be permitted by law to deny a legal right of set-off by calling an actual redemption of collateral notes deposited by it with a creditor, a purchase, and we can see no sufficient reason why under substantially similar conditions such privilege should be accorded a receiver.

Under the terms of the collateral note the bank had the right to redeem the notes deposited with the trust company as security for the loan; the trust company, on default of the bank, could have sold such notes, and in that event it would have been its duty to credit the amount received therefor as a payment on the note of the bank; the right of the bank was to redeem, and the right of the trust company was to sell on default of the bank. The receiver, on his appointment as such, stood in the place of the bank; he sought to avoid a compliance with the terms of the collateral note by procuring the entry of an order of court which authorized him to purchase the note in question. We are of the opinion that on the facts disclosed by this record this transaction should be held to be a redemption and not a purchase of the note.

We are inclined to agree with the contention of counsel that defendants would have had no right of set-off as against the trust company; that company of course in the event of default in payment of the collateral note could have set up that it was a pledgee of the note and that it had taken it before maturity, without notice of any right of set-off existing in the maker or endorser as against the pledgor. The issue here is not as to the rights of the trust company resulting from the pledge of the note in question, and, as has been stated, the receiver, with relation to the matter in dispute, stands in the place of the bank rather than that of the trust company, and as we view the facts of the case the receiver cannot be regarded as being in any sense or at any time a pledgee of the note.

It is further contended by plaintiff that even if it be conceded that the transaction by which the receiver took the $100,000 note and collateral therefor from the trust company be held to be a redemption of such collateral, nevertheless the defendants are not permitted to set off the amount of the deposit in the bank against any sum that may be due upon the note.

It may be quite true, as asserted by counsel for plaintiff, that under certain conditions the receiver might have entered into contracts and relations for the purpose of procuring money to redeem the notes in question, under such circumstances as would defeat or postpone the defendants' right of set-off. Under the facts of the instant case, however, we are inclined to think that defendants' right of set-off has not been defeated by the circumstances under which the receiver obtained possession of the note.

It is also asserted that the defendant Abraham L. Feldman, being an endorser and guarantor of the note in ques-

We are inclined to agree with the contention of counsel that defendants could have had no right of set-off as against the trust company; that company of course in the event of default in payment of the collateral note could have set up that it was a pledgee of the note and that it had taken it before maturity, without notice of any right of set-off existing in the maker or endorser as against the pledgor. The issue here is not as to the rights of the trust company resulting from the pledge of the note in question, and, as has been stated, the receiver, with relation to the matter in dispute, stands in the place of the bank rather than that of the trust company, and as we view the facts of the case the receiver cannot be regarded as being in any sense or at any time a pledgee of the note.

It is further contended by plaintiff that even if it be conceded that the transaction by which the receiver took the $100,000 note and collateral therefor from the trust company be held to be a redemption of such collateral, nevertheless the defendants are not entitled to set off the amount of the deposit in the bank against any sum that may be due upon the note.

It may be quite true, as contended by counsel for plaintiff, that under certain conditions the receiver might have entered into contracts and relations for the purpose of procuring money to redeem the notes in suit, under such circumstances as would relieve or vest in the defendants' right of set-off. Under the facts of the instant case, however, we are inclined to think that defendants' right of set-off has not been defeated by the circumstances under which the receiver obtained possession of the note.

It is also asserted that the contention of plaintiff, being an endorser and guarantor of the note in question, bring an endorser and guarantor of the note in ques-

tion, cannot set off against his liability as such endorser the deposit of the firm of Feldman Bros. in the bank. Suit was dismissed in the Municipal Court as to all of the defendants except Abraham L. Feldman and Morris Feldman, both of whom were members of the firm of Feldman Bros.; the defendants individually became, at least secondarily, liable by their endorsement of this note for its payment. It is insisted that this copartnership deposit cannot be set off in the suit of the receiver against the defendants Abraham L. Feldman and Morris Feldman, individually, as guarantors of the note. We do not agree with this contention. Under the Negotiable Instruments Act, chapter 98 of the Revised Statutes of Illinois, endorsers of negotiable instruments are declared to be secondarily liable upon such instruments. One who endorses in blank a promissory note becomes, in legal effect, a surety for its payment when due. In Marcy v. Whallon, 115 Ill. App. 435, it was held that a surety may interpose by way of defense to an action against him a demand due from the plaintiff to the principal defendant. "While it is a general rule that in order that a set-off may be applied there must be mutual and connected demands between the same parties and in the same right, yet suits against principal and surety furnish an exception to the rule." In Himrod v. Baugh, 85 Ill. 435, it was held in a suit against a principal and his sureties, that the sureties, as defendants, could plead by way of set-off a demand due from the plaintiff to the principal defendant. Feldman Bros., the makers of the note in question, would have been permitted, by way of defense to an action on the note, to avail themselves of any legal de-

tion, cannot set off against his liability on such endorsement the deposit of the firm of Weidman Bros. in the bank. Suit was dismissed in the Municipal Court as to all of the defendants except Abraham L. Weidman and Morris Weidman, both of whom were members of the firm of Weidman Bros.; the defendants individually became, at least secondarily, liable by their endorsement of this note for its payment. It is indicated that this counterveailing deposit cannot be set off in the suit of the receiver against the defendants Abraham L. Weidman and Morris Weidman, individually, as guarantors of the note. We do not agree with this contention. Under the Negotiable Instruments Act, chapter 98 of the Revised Statutes of Illinois, endorsers of negotiable instruments are declared to be secondarily liable upon such instruments. One who endorses in blank a promissory note becomes, in legal effect, a surety for its payment when due. In Kenoy v. Mallon, 115 Ill. App. 638, it was held that a surety may interpose by way of defense to a motion against him a demand due from the plaintiff to the principal defendant. "While it is a general rule that in order that a set-off may be applied there must be mutual and connected demands between the same parties and in the same right, yet suits against principal and surety Furnish an exception to the rule." In Tilmod v. Tuerk, 83 Ill. 438, it was held in a suit by that a principal and his sureties, that the sureties, as defendants, could plead by way of set-off a demand due from the plaintiff to the principal defendant. Weidman Bros., the maker of the note in question, would have been permitted, by way of defense to an action on the note, to avail themselves of any legal de-

fenses to the action, - such, for instance, as whole or partial payment of the note, - and they would likewise have been permitted, had the action been brought by the bank, to have urged any valid set-off that they might have to their liability on the note. We are aware of no rule of law which holds a guarantor, an endorser or a surety of a negotiable instrument to a higher liability upon a negotiable instrument than is imposed upon the principal maker of such instrument.

The defendants, by the use of express language, guaranteed the payment of "the within note." Whether the obligation assumed by them be regarded under the Negotiable Instruments Act as a primary or secondary liability, it is obvious that their agreement was to pay the debt of another, and we can see no reason why, under the authority of the cases last above cited, they should not be permitted to set off the debt due their principal by the bank, against the receiver's action on the note.

The judgment of the Municipal Court is reversed and judgment is entered in this court in favor of the plaintiff in the sum of $1646.02 with costs against plaintiff here and below.

REVERSED AND JUDGMENT HERE.

ferences to the action, - such, for instance, as short or certain payment of the note, - and [illegible] would likewise have been permitted, had the action been brought by the [illegible], to have urged on their cut-off [illegible] to [illegible] liability on the note. We are [illegible] of no [illegible] that mere mere a guarantor, in contrast to a party of a negotiable instrument to a higher liability upon a negotiable instrument than is imposed upon the principal maker of such instrument.

The defendants, by the use of "[illegible] guaranteed the payment of "the within note." Whether the obligation assumed by them be regarded as the negotiable instruments act as a [illegible] or [illegible] liability, it is obvious that [illegible] and we can see no reason why, under the principle of the cases just above cited, [illegible] be [illegible] off the [illegible] of the [illegible] receiver's [illegible] on the note.

The [illegible] and judgment is entered in [illegible] plaintiff in the sum of $1646.02 with costs against plaintiff here and below.

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WILLIAM C. NIBLACK, as Receiver of the LaSalle Street Trust and Savings Bank,
Appellee,

vs.

GOLSEN-DOAN COAL COMPANY,
Appellant.

APPEAL FROM MUNICIPAL OF CHICAGO.

204 I.A. 445

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, in suit against defendant on its promissory note, upon an instructed verdict had judgment for $2,256.67, from which defendant appeals.

The note of the defendant given to the La Salle Street Trust and Savings Bank is one of the group of notes delivered by this bank to the International Trust Company of Boston, and returned by the trust company to the receiver, under the circumstances set out in detail in the opinion by Mr. Justice Dever in Niblack, Receiver, v. Feldman et al., No. 22658, this day filed. What is said in that opinion as to the facts is applicable also to this case, and the conclusions of law therein expressed control our decision herein.

Our conclusion that the transfer of the notes by the International Trust Company to the receiver was not a sale but was a redemption by the receiver, disposes of all the points presented in the instant case. Defendant was entitled to set off its deposit against the claim of the plaintiff, and its motion to so instruct the jury should have been allowed.

By the pleading the amount of defendant's deposit was admitted to be $2,383.22; setting this off

WILLIAM C. MIRLACK, as Receiver of the Lasalle Street Trust and Savings Bank,
Appellee,

vs.

GOLDEN-DOAN COAL COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

COALITIES

MR. PRESIDING JUSTICE MCSURLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff, in suit against defendant on its promissory note, upon an instructed verdict had judgment for $2,256.07, from which defendant appeals.

The note of the defendant given to the La Salle Street Trust and Savings Bank is one of a group of notes delivered to this bank by the Intercontinental Trust Company of Illinois, and returned by the trust company to the receiver, under the circumstances set out in detail in the opinion by Mr. Justice Green in Hallock, Receiver, v. Keith et al., No. 22774, this day filed. What is said in that opinion as to the rights of the parties applicable to this case, and the conclusions of law therein expressed control our decision herein.

Our jurisdiction [illegible] of the notes by the intercontinental [illegible] receiver [illegible] not a sale but was a recognition by the receiver, in lieu of all the points presented [illegible] and [illegible] entitled to set off the [illegible] of the [illegible] tiff, and its motion to [illegible] have been allowed.

By the pleading the amount of defendant's counterclaim was admitted to be $2,382.00; [illegible]

against the amount of plaintiff's judgment leaves a balance due defendant of $126.45. The judgment of the Municipal Court is reversed, and judgment will be entered in this court for the defendant on its set-off, and against the plaintiff, for $126.45, to be paid in due course of administration.

REVERSED AND JUDGMENT HERE.

against the amount of plaintiff's judgment leaves a balance due defendant of $186.46. The judgment of the Municipal Court is reversed, and judgment will be entered in this court for the defendant on its set-off, and against the plaintiff, for $186.46, to be paid in due course of administration.

REVERSED AND JUDGMENT HERE.

346 - 22780

JOE RUDZINSKI,
Appellee,

vs.

GROVER C. ELMORE,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

204 I.A. 446

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to have reversed a judgment entered against him for $270, in a suit brought by the plaintiff to recover moneys paid by plaintiff to defendant.

The evidence is in more or less confusion. Plaintiff did not understand English, and the interpreter upon the trial seems to have had difficulty in eliciting a clear story. We think, however, that from the testimony of all the witnesses the trial court could properly find that the defendant, who was a dealer in real estate, entered into negotiations looking to the sale of a lot to plaintiff. The understanding, which was partly by parol and evidenced by receipts, was that when plaintiff should be able to pay $500 on account of the purchase price, a written contract was to be entered into for the sale of the lot. Plaintiff made two payments, one of $100 and the other of $170, for which he received receipts from defendant. These receipts are indefinite in terms, and amount to no more than evidence of the payment of money in pursuance of an understanding between the parties as stated. Subsequently, when plaintiff had accumulated the balance of the earnest money, a contract was drawn up and submitted to plaintiff. There then arose some disagreement as to the lot which was to be the subject

346 - 22720

JOE RUDZINSKI,
Appellee,

vs.

GROVER C. KIMORE,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

204 I.A. 146

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to have reversed a judgment entered against him for $270, in a suit brought by the plaintiff to recover moneys paid by plaintiff to defendant.

The evidence is in more or less confusion. Plaintiff did not understand English, and the interpreter upon the trial seems to have had difficulty in eliciting a clear story. We think, however, that from the testimony of all the witnesses the trial court could properly find that the defendant, who was a dealer in real estate, entered into negotiations looking to the sale of a lot to plaintiff. The understanding, which was partly by parol and evidenced by receipts, was that when plaintiff should be able to pay $500 on account of the purchase price, a written contract was to be entered into for the sale of the lot. Plaintiff made two payments, one of $100 and the other of $170, for which he received receipts from defendant. These receipts are indefinite in terms, and amount to no more than evidence of the payment of money in pursuance of an understanding between the parties as stated. Subsequently, when plaintiff had accumulated the balance of the earnest money, a contract was drawn up and submitted to plaintiff. There then arose some disagreement as to the lot which was to be the subject

of the contract. Plaintiff claimed that he submitted the contract to someone in a bank who informed him, in substance, that it was not the contract which he had contemplated making. As near as we can ascertain from the record, the defendant, before plaintiff was ready with the whole amount of his earnest money, had sold the lot plaintiff had intended to buy, and plaintiff was not willing to take another piece of property which defendant offered him.

Whatever may be the facts as to the misunderstanding about the property, we think it is manifest that there never was any contract between the parties. Defendant's counsel argues as if there was a parol contract for the purchase of real estate; this is not supported by the evidence. At most, there was a verbal understanding that as soon as plaintiff should be able to pay $500 on account of the purchase price a contract would be entered into. There was no agreement that the payments which plaintiff might make on account of the earnest money, and before a contract was entered into, should be retained by the defendant. The whole matter was conditioned upon plaintiff's ability to gather together $500, and if he should be unable to do this, there is no legal reason why defendant should retain any moneys paid over to him on account.

Either upon the ground that there was no contract between the parties, or that defendant refused to enter into a written contract for the particular property concerning which the parties had negotiated, the judgment of the trial court is right and is affirmed.

AFFIRMED.

of the contract. Plaintiff claimed that he submitted the contract to someone in a bank who informed him, in substance, that it was not the contract which he had contemplated making. As near as we can ascertain from the record, the defendant, before plaintiff was ready with the whole amount of his earnest money, had sold the lot plaintiff had intended to buy, and plaintiff was not willing to take another piece of property which defendant offered him.

Whatever may be the facts as to the misunderstanding about the property, we think it is manifest that there never was any contract between the parties. Defendant's counsel argues as if there was a perfect contract for the purchase of real estate; this is not supported by the evidence. At most, there was a verbal understanding that as soon as plaintiff should be able to pay $500 on account of the purchase price a contract would be entered into. There was no agreement that the payments which plaintiff might make on account of the earnest money, and before a contract was entered into, should be retained by the defendant. The whole matter was conditioned upon plaintiff's ability to gather together $500, and if he should be unable to do this, there is no legal reason why defendant should retain any money paid over to him on account.

Either upon the ground that there was no contract between the parties, or that defendant refused to enter into a written contract for the particular property concerning which the parties had negotiated, the judgment of the trial court is right and is affirmed.

AFFIRMED.

352 - 22786

SAMUEL KERSTEN,
Appellee,

vs.

WEST COAST ROOFING AND MANUFACTURING CO., a corp.,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

204 I.A. 447

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover for labor and materials furnished to the defendant; upon trial by the court he had judgment for $867.03.

The controversy centers around a boiler which plaintiff, by a written proposal, undertook to install in the factory building belonging to defendant, defendant claiming that it was not in compliance with plaintiff's undertaking. By his contract in writing, plaintiff undertook to furnish "one 20 horse power submerged tube vertical high pressure steam boiler for working pressure of 100 lbs. per square inch, size of boiler to be 42x87 and to pass all City requirements for working pressure of 100 lbs." That such a boiler was installed is not disputed, but defendant claims that it was defective.

We hold that the court could properly find that the defense of defects in the boiler or workmanship was not proven. It was demonstrated that the difficulty which arose in the use of the boiler by defendant was because of the fact that this size boiler was inadequate for the requirements of defendant. Many witnesses testified who were experienced in boilers, and none of them undertakes to point out any defects in the construction or mechanical work or material of the

352 - 22786

SAMUEL KERSTEN,
Appellee,

vs.

WEST COAST ROOFING AND MANUFACTURING CO., a corp.,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

204 I.A. 447

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover for labor and materials furnished to the defendant; upon trial by the court he had judgment for $887.03.

The controversy centers around a boiler which plaintiff, by a written proposal, undertook to install in the factory building belonging to defendant, defendant claiming that it was not in compliance with plaintiff's undertaking. By his contract in writing, plaintiff undertook to furnish "one 20 horse power submerged tube vertical high pressure steam boiler for working pressure of 100 lbs. per square inch, size of boiler to be 42x87 and to pass all City requirements for working pressure of 100 lbs." That such a boiler was installed is not disputed, but defendant claims that it was defective.

We hold that the court could properly find that the defense of defects in the boiler or workmanship was not proven. It was demonstrated that the difficulty which arose in the use of the boiler by defendant was because of the fact that this size boiler was inadequate for the requirements of defendant. Many witnesses testified who were experienced in boilers, and none of them undertaken to point out any defects in the construction or mechanical work or material of the

boiler. It also appears that the defendant at one time had employed an architect who had drawn specifications for the defendant, and it is a fair inference that these specifications were followed in the proposal and contract under which the work was done; in fact, it is in evidence that the specifications under which plaintiff worked were drawn by the superintendent of construction employed by the defendant. There was no guaranty by the plaintiff that this kind of boiler would do the work, and nothing in the entire contract which could be so construed. The trial court could rightly conclude that the defendant relied upon its own judgment, formed under advices of experienced men in its employ, as to the style and size of the boiler required; it therefore can not be heard to say that there was any fraud on the part of the plaintiff.

Counsel for defendant have cited many cases as to implied warranties and duress, and have endeavored to show misrepresentation by the plaintiff. The facts being as we have above indicated, none of these citations is in point, and misrepresentations on the part of the plaintiff were not proven.

The decisions applicable to this case are those in which it has been held that where a contract calls for the delivery of a certain, specified kind of article, there is no implied warranty of its fitness for any purpose, other than that it be the kind specified. In Peoria Grape Sugar Co. v. Turney, 175 Ill. 631, the court quotes with approval from the English "Sale of Goods act" as follows:

> "In the case of a contract for the sale of a specified article under its patent or other trade name there is no implied contract as to its fitness for any particular purpose,' for the reason, as stated in the authorities, that 'an undertaking as to fitness is not implied where the buyer gets what he bargained for.'"

boiler. It also appears that the defendant at one time had employed an architect who had drawn specifications for the defendant, and it is a fair inference that these specifications were followed in the proposal and contract under which the work was done; in fact, it is in evidence that the specifications under which plaintiff worked were drawn by the superintendent of construction employed by the defendant. There was no guaranty by the plaintiff that this kind of boiler would do the work, and nothing in the entire contract which could be so construed. The trial court could rightly conclude that the defendant relied upon its own judgment, formed under advices of experienced men in its employ, as to the style and size of the boiler required; it therefore can not be heard to say that there was any fraud on the part of the plaintiff.

Counsel for defendant have cited many cases as to implied warranties and duress, and have endeavored to show misrepresentation by the plaintiff. The facts being as we have above indicated, none of these citations is in point, and misrepresentations on the part of the plaintiff were not proven.

The decisions applicable to this case are those in which it has been held that where a contract calls for the delivery of a certain, specified kind of article, there is no implied warranty of its fitness for any purpose, other than that it be the kind specified. In Morris Steam Pump Co. v. Tanner, 175 Ill. 601, the court quotes with approval from the English "Sale of Goods Act" as follows:

> "In the case of a contract for the sale of a specified article under its patent or other trade name there is no implied contract as to its fitness for any particular purpose, for the reason, as stated in the authorities, that 'an unauthorizing as to fitness is not implied where the buyer gets what he bargains for.'"

And in Fuchs & Lang Co. v. Kittredge & Co., 242 Ill. 88, 97, the court said:

> "Where a known, described and definite article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, described and definite article be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. In a contract for the sale of an article under its patent or other trade name there is an undertaking that the article delivered shall be of the kind ordered but not that it shall be fit for any particular purpose. If the buyer gets what he bargained for, there is no implied warranty though it does not answer his purpose."

This is in accord with the decisions in a very large number of cases.

Under the facts of this case no other proper conclusion was possible, and the errors, if any, upon the trial in rulings on evidence or upon propositions tendered are not sufficient to warrant a reversal. The judgment is affirmed.

AFFIRMED.

And in Funke & Lane Co. v. Altenbrae & Co., 242 Ill. 88, 97, the court said:

"Where a known, described and definite article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, described and definite article be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. In a contract for the sale of an article under its patent or other trade name there is an understanding that the article delivered shall be of the kind ordered but not that it shall be fit for any particular purpose. If the buyer gets what he bargained for, there is no implied warranty though it does not answer his purpose."

This is in accord with the decisions in a very large number of cases.

Under the facts of this case no other proper conclusion was possible, and the errors, if any, upon the trial in rulings on evidence or upon propositions tendered are not sufficient to warrant a reversal. The judgment is affirmed.

AFFIRMED.

355 - 22789

TIMOTHY O'BRIEN and
NELLIE O'BRIEN,
Appellees,

vs.

MICHAEL E. QUIRK,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

204 I.A. 448

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit to recover moneys paid by them to the defendant on a certain contract for the sale of real estate, which it was averred defendant refused to perform, and also for money loaned to the defendant. Upon trial by the court plaintiffs had judgment for $941.

There is no dispute as to the amount of money paid, nor as to the obligation of defendant to return it because of his failure to perform the contract, and even if this were questioned by defendant's counsel the court properly could so conclude.

The point which defendant attempts to make in this court is, as stated, that the judgment "is not supported by the finding of the court" and is therefore erroneous. This point is based upon some informal talk by the trial court indicating that the court thought "that Mr. O'Brien, the plaintiff, ought to have his money back." This is not the formal finding of the court. The record reads, "The court finds the issues against the defendant and assesses the plaintiffs' damages at the sum of," etc. The order of judgment reads, "That the plaintiffs have judgment on the finding herein and that the plaintiffs have and recover of and from the defendant

TIMOTHY O'BRIEN and
NELLIE O'BRIEN,
Appellees,

vs.

MICHAEL K. QUIRK,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE MORAN
DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit to recover moneys paid by them to the defendant on a certain contract for the sale of real estate, which it was averred defendant refused to perform, and also for money loaned to the defendant. Upon trial by the court plaintiffs had judgment for $941.

There is no dispute as to the amount of money paid, nor as to the obligation of defendant to return it because of his failure to perform the contract, and even if this were questioned by defendant's counsel the court properly could so conclude.

The point which defendant strenuously uses in this court is, as stated, that the judgment "is not supported by the finding of the court" and is therefore erroneous. This point is based upon some informal talk by the trial court indicating that the court thought "that Mr. O'Brien, the plaintiff, ought to have his money back." This is not the formal finding of the court. The record reads, "The court finds the issues against the defendant and assesses the plaintiffs' damages at the sum of," etc. The order of judgment reads, "That the plaintiffs have judgment on the finding herein and that the plaintiffs have and recover of and from the defendant

the damages of the plaintiffs." The judgment and finding are consistent, and there is no merit in defendant's point.

The law is so well established as to require no citations, that in a contract of this sort, where the seller of real estate refuses to make a deed or comply with his undertaking, the buyer is entitled to recover whatever moneys he may have paid.

There is no reason to reverse the judgment, and it is affirmed.

AFFIRMED.

the damages of the plaintiffs." The judgment and finding are consistent, and there is no merit in defendant's point.

The law is so well established as to require no citations, that in a contract of this sort, where the seller of real estate refuses to make a deed or comply with his undertaking, the buyer is entitled to recover whatever moneys he may have paid.

There is no reason to reverse the judgment, and it is affirmed.

AFFIRMED.

562 - 21960

2719

MARGARET HOULIHAN, as Administratrix of the Estate of FRANK A. HOULIHAN, deceased, Appellee,

vs.

SULZBERGER & SONS COMPANY, Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

204 I.A. 449

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Superior Court against Sulzberger & Sons Company for the sum of $6,500 and in favor of Margaret Houlihan, as administratrix of the estate of Frank A. Houlihan, deceased.

It was charged in the declaration filed in the case that plaintiff's intestate came to his death by and through the negligence of the defendant. Plaintiff's intestate at the time he met his death was an employe of the Hamler Boiler & Tank Works (hereinafter referred to as the Hamler Company). The defendant had entered into a contract with the Hamler Company, under the terms of which the latter company was employed to adjust and tighten a certain iron band around a smokestack upon the premises of defendant. The smokestack was held in place by means of guy wires attached to the iron band about the stack, the other ends of which wires were attached by bolts to buildings on the premises. The contract under which deceased's employer agreed to do this work was to be performed on the hour basis, the charge provided in the contract being 90 cents to $1.00 an hour for "each man on the job."

The defendant had maintained on and in one of the buildings in question, to which one of the guy wires

882 - 21900

MARGARET HOULIHAN, as Administratrix of the Estate of FRANK A. HOULIHAN, deceased, Appellee,	
vs.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
SULZBERGER & SONS COMPANY, Appellant.	

MR. JUSTICE MAYER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the superior Court against Sulzberger & Sons Company for the sum of $6,500 and in favor of Margaret Houlihan, as administratrix of the estate of Frank A. Houlihan, deceased.

It was charged in the declaration filed in the case that plaintiff's intestate came to his death by and through the negligence of the defendant. Plaintiff's intestate at the time he met his death was an employe of the Hanlor Boiler & Tank Works (hereinafter referred to as the Hanlor Company). The defendant had entered into a contract with the Hanlor Company, under the terms of which the latter company was employed to adjust and tighten a certain iron band around a smokestack upon the premises of defendant. The smokestack was held in place by means of guy wires attached to the iron band about the stack, the other ends of which wires were attached by bolts to buildings on the premises. The contract under which deceased's employer agreed to do this work was to be performed on the hour basis, the charge provided in the contract being 50 cents to $1.00 an hour for "each man on the job."

The defendant had maintained on and in one of the buildings in question, to which one of the guy wires

referred to had been fastened, two permanent ways by means of which access might be had to the roof of the building. One of these ways was an inside stairway leading from the ground to the 5th floor of the building. There is some dispute in the evidence as to what means was provided for access to the roof from this 5th floor. Certain witnesses testified that a ladder was provided for such use, by use of which it was possible to reach the roof of the building from the 5th floor through an opening in the roof. The other means maintained by defendant for approach to the roof of the building was a ladder, described by some of the witnesses as a "fire ladder," attached to the exterior of the building. This ladder extended from the ground to a roof over a loading platform; this roof was about level with the second floor of the building, and another ladder extended perpendicularly from this roof to the top of the building.

Immediately before the time of the accident in question plaintiff's intestate was ascending the upper one of the two last mentioned ladders. He carried in his hands a line which was attached to the loose end of a guy wire that lay on the ground. He was assisted in this work by a man named Buckley, and the two men were about to raise the guy wire to which the line was attached, for the purpose of attaching it to an eye-bolt near the top of the building, when certain rungs in the ladder upon which deceased was working gave way, and he was precipitated to the ground and he sustained injuries as the result of which he died.

It is insisted on behalf of the defendant that deceased, while on the ladder, was a trespasser, or, at most, a bare licensee, and that defendant owed him no duty except not to wilfully injure him, and in support of this contention it is argued that under its contract with the

referred to had been fastened, two permanent ways by means of which access might be had to the roof of the building. One of these ways was an inside stairway leading from the ground to the 5th floor of the building. There is some dispute in the evidence as to what means was provided for access to the roof from this 5th floor. Certain witnesses testified that a ladder was provided for such use, by use of which it was possible to reach the roof of the building from the 5th floor through an opening in the roof. The owner seems maintained by defendant for ingress to the roof of the building was a ladder, described by some of the witnesses as a "fire ladder," attached to the exterior of the building. This ladder extended from the ground to a roof over a loading platform; this roof was about level with the second floor of the building, and another ladder extended perpendicularly from this roof to the top of the building.

Immediately before the time of the accident in question plaintiff's intestate was across the roof of one of the two last mentioned ladders. He carried in his hands a line which was attached to the lower end of a pipe that lay on the ground. He was engaged in tying an empty hoisted crately, and the men were about to raise the crate to place to which the line was attached, for the purpose of attaching it to an eye-bolt near the top of the building, when certain rungs in the ladder upon which he was standing gave way, and he was precipitated to the ground and sustained injuries as the result of which he died.

It is in dispute as to the manner in which the deceased, while on the ladder, came to be there, if, at most, a pure license, but that he was not there by any express act to wilfully injure him, and in support of the contention it is argued that under the contract with the

Hamler Company the defendant owed Houlihan no duty to furnish him with means of access to the roof.

The contract referred to provided for the performance of some repair work by the deceased's employer for the defendant, the work to be performed being the tightening of a loose band upon the smokestack in question. The contract did not provide for the construction of any permanent building or ways upon the premises of defendant; it did not include the furnishing of materials for any purpose; and it was essentially an agreement for the doing of relatively unimportant repair work upon the premises. Possession of no part of the premises was given over to the Hamler Company for the performance of this work; nor was it necessary to do so for proper execution of the work that it was employed to perform. During the course of this work all parts of the premises remained in the possession of and under the control of the defendant. Having in mind the contract in question and what it provided, it was, we think, the duty of the defendant company to use reasonable care to furnish deceased with a safe means of access to the roof of the building.

It is also urged that the defendant had the right to assume that Houlihan, the deceased, would use such ordinary, regular and safe means as were present on the premises, for the performance of the work in which he was engaged, and not an unusual and hazardous means; and it is asserted that Houlihan for his own convenience put the ladder in question to a use for which it was not designed.

There is evidence in the record to the effect that this ladder was used and provided as a fire ladder, although certain witnesses, including the foremen and other employes of defendant, testified that the ladder was used by

Hamler Company the defendant owed Moulton no duty to furnish him with means of access to the roof.

The contract referred to provided for the performance of some repair work by the deceased's employer for the defendant, the work to be performed being the tightening of a loose band upon the smokestack in question. The contract did not provide for the construction of any permanent building or ways upon the premises of defendant; it did not include the furnishing of materials for any purpose; and it was essentially an agreement for the doing of relatively unimportant repair work upon the premises. Possession of no part of the premises was given over to the Hamler Company for the performance of this work; nor was it necessary to do so for " proper execution of the work that it was employed to perform. During the course of this work all parts of the premises remained in the possession of and under the control of the defendant. Having in mind the contract in question and what it provides, it was, we think, the duty of the defendant company to use reasonable care to furnish deceased with a safe means of access to the roof of the building.

It is also urged that the defendant had no right to assume that Moulton, the deceased, would use such ordinary, regular and safe means as were [illegible] at the premises, for the performance of the work [illegible] was [illegible], and that an unusual and hazardous [illegible]; and it is [illegible] that [illegible] ban for his own convenience [illegible] to use for which it was not designed.

There is evidence in the record to the effect that this ladder was used and provided [illegible] it [illegible], although certain witnesses, including [illegible] and other employes of defendant, testified that the ladder was used by

them for other than fire protection purposes. One McLaughlin, foreman for defendant, testified that he did have occasion to go to the roof of the building, and that in doing so "we went up both ways; sometimes up the ladder, sometimes up the steps; sometimes I would go up the inside and come down the outside, and then we went up the outside and come down in the inside. * * I think I went up there a couple of times a week, clear from the bottom. * * I have seen men go up there."

There was evidence heard on the trial which tended to show that the deceased was on the premises of the defendant by its implied invitation; that he used a means or way for approach to the roof of the building in question which was convenient for the use he had put it to; and that the ladder, from which he fell, had been used freely by the employes of the defendant in and about their work.

It is also urged by counsel that the defendant was not guilty of any negligence in the maintenance of the ladder, and that even if it be conceded that the ladder was in a defective condition at the time of the accident, there is no evidence in the record from which the jury were authorized to determine that the defendant had actual or constructive knowledge of such defective condition.

The evidence tends to disclose that two rungs of the upper ladder gave way under deceased. He had been immediately preceded up the ladder by a co-employe, who testified that immediately after the accident he noticed the two rungs on the roof of the canopy, and that they were rotten on the ends; that the ends were rotten "a half an inch or so"; and that he could crumble and twist off part of the ends with his fingers. The rungs of the ladder were kept in place by being mortised into the outer

them for other than fire protection purposes. The foreman, Foreman for defendant, testified that he did have occasion to go to the roof of the building, and that in doing so "we went up both ways; sometimes up the ladder, sometimes up the steps; usually I would go up the inside and come down the outside, and then we went up the outside and come down in the inside. * * I think I went up there a couple of times a week, clear from the bottom. * * I have seen men go up there."

Therefore evidence heard on the trial which tended to show that the defendant, on the premises of the defendant by its supplies activities, must be used as means or way for approach to the roof of the building in question which was convenient for the use he did not [illegible]; and that the ladder, from which he fell, had been used frequently by the employes of the defendant in [illegible].

It is also urged by counsel that the defendant was not guilty of a [illegible] in [illegible] of the ladder, and that even if it be assumed that the ladder was in a defective condition [illegible] the fall, there is no evidence in the record [illegible] that defendant had reason to anticipate that [illegible] structive knowledge [illegible].

The evidence tends to show [illegible] of the upper ladder gave way [illegible] immediately preceded by a [illegible] testified that [illegible] the one rung on the [illegible] were motion on the [illegible] an inch or so"; [illegible] part of one rung with one finger. [illegible] der were kept in place by [illegible] [illegible]

edge of the uprights, and to the outer face of these uprights perpendicular strips were nailed which kept the rungs in their place in the ladder. When deceased, in ascending the ladder, had reached nearly to the top of the building he was seen to fall over backwards from the ladder. Two of the rungs, the second and third from the top, had given way and had fallen down with deceased to the roof over the loading platform. After the accident it was seen that the perpendicular strips which had been nailed over the face of the uprights were hanging loose at the point where the two rungs had given way.

It is fairly inferable from the evidence in the record that the accident was caused by the rotten condition of the ends of the two rungs, and by the insecure manner in which the perpendicular strips in question were attached to the uprights into which the rungs were mortised.

It is earnestly insisted on behalf of the defendant that defendant had exercised every reasonable care to make the ladder safe for the purposes for which it was intended to be used. The ladder was erected about seven years before the time of the accident, and certain witnesses for the defendant testified that frequent inspections had been made of it, that it had been painted annually, and that an inspection was made of the ladder about two months before the date of the accident. There can be no doubt on this record that the ladder in question was defective, and that the defects caused the death of plaintiff's intestate. Whether under this evidence the defendant can fairly be charged with actual or constructive notice of these defects was, we believe, a question of fact for the determination of the jury. The rungs which gave way in the ladder were last seen immediately after the deceased had fallen; they were

edge of the uprights, and to the outer face of these uprights perpendicular strips were nailed which kept the rungs in their place in the ladder. When deceased, in ascending the ladder, had reached nearly to the top of the building he was seen to fall over backwards from the ladder. Two of the rungs, the second and third from the top, had given way and had fallen down with deceased to the roof over the loading platform. After the accident it was seen that the perpendicular strips which had been nailed over the face of the uprights were hanging loose at the point where the two rungs had given way.

It is fairly inferable from the evidence in the record that the accident was caused by the broken condition of the ends of the two rungs, and by the insecure manner in which the perpendicular strips in question were attached to the uprights into which the rungs were mortised.

It is earnestly insisted on behalf of the defendant that defendant had exercised every reasonable care to make the ladder safe for the purposes for which it was intended to be used. The ladder was erected about seven years before the time of the accident, and certain witnesses for the defendant testified that frequent inspections had been made of it, that it had been painted annually, and that an inspection was made of the ladder about two months before the date of the accident. There can be no doubt on this record that the ladder in question was defective, and that the defects caused the death of plaintiff's intestate.

Whether under this evidence the defendant can fairly be charged with actual or constructive notice of these defects was, we believe, a question of fact for the determination of the jury. The rungs which gave way in the ladder were lost sight immediately after the deceased had fallen; they were

not produced at the trial; but it does not seem to be seriously disputed that they were rotten. Whether the defective and dangerous condition of the ladder could have been discovered by competent inspection, and whether the ladder had been properly constructed, were, under the evidence in this case, questions of fact for the determination of the jury. There was evidence taken at the trial from which the jury might fairly conclude that the ladder in question was in a dangerous and unsafe condition, and that such condition could have been discovered by the defendant in the exercise of reasonable care for the protection of persons who might properly have occasion to use it. There was some evidence to the effect that with reference to one of the rungs in question it was rotten at both ends, and that at the time of the accident three or more other rungs were found to be loose.

In Newingham v. Blair Co., 232 Pa. 511, it appeared that a tinner was injured as the result of a collapse of a fire escape which he was using in his work for his employer, a subcontractor. Deciding the case the court said:

> "In the present case the defect was in a fire escape which from its very nature, and by reason of the purpose it was intended to serve should have been kept in a safe condition for use at all times. To be sure the use which the defendant company directed should be made of it by the plaintiff was not the ordinary office of a fire escape, but it was apparently not an improper use, and, at any rate, it was placed at the disposal of the plaintiff and his fellow workmen by the express direction of the officer of the defendant company. In making use of the fire escape, as directed and required, the plaintiff had a right to rely on the presumption that the defendant had performed its duty in providing a reasonably safe means of access to the roof. The fire escape was under the circumstances to all intents and purposes, an outside stairway. If, instead of making use of it, the plaintiff had been instructed to take the inside stairway, and had been injured by the giving way of an improperly constructed platform, it would hardly be contended that the defendant would not be liable for the results. The fact that the fire escape, temporarily transformed at the direction of the defendant into a stairway, was located outside of the building, rather

not produced at the trial; but it does not seem to be seriously disputed that they were rotten. Whether the defective and dangerous condition of the ladder could have been discovered by competent inspection, had whether the ladder had been properly constructed, were, under the evidence in this case, questions of fact for the determination of the jury. There was evidence taken at the trial from which the jury might fairly conclude that the ladder in question was in a dangerous and unsafe condition, and that such condition could have been discovered by the defendant in the exercise of reasonable care for the protection of persons who might properly have occasion to use it. There was also evidence to the effect that with reference to one of the steps in question it was rotten at both ends, and that it was one of the accident three or more other round were found, loose.

In Hemingway v. Allen [illegible] it appeared that was injured as the result of a collapse of a fire escape which he was using in his apartment [illegible] contractor. Deciding the case the court said:

> "In the present case the fire escape which the [illegible] was using. The purpose of the purpose it was intended to serve [illegible] it a safe condition for use at all times. [illegible] was using the defendant [illegible] of it by the [illegible] fire escape, [illegible] plaintiff [illegible] of the [illegible] of the [illegible] fendant had performed [illegible] safe [illegible] under the circumstances [illegible] outside [illegible] plaintiff [illegible] properly constructed [illegible] tender [illegible] notice. The fact [illegible] structures of the [illegible] railway. The [illegible]

than inside, cannot change the principle involved. See, also, Reynolds v. Brod. C. Co., 192 Ill. App. 157.

In the cases just cited it appeared that the injured persons used the ways referred to in the cases - which were not in their nature intended for the use they were in fact put to - on the express invitation of the defendants, and in this respect they differ from the case at bar. We are inclined to the view, however, that here there was an implied invitation extended to deceased to use a way which was intended to be and was in fact used generally by persons who, in the course of their employment, were required to go to the roof of the building.

After verdict the court allowed plaintiff to amend the declaration. The original declaration charged that the deceased, while working for his employer, was engaged in and "about the placing and repair of a certain large smokestack." As amended, the declaration charged with more particularity the particular thing in and about the doing of which the deceased was employed. The amendment in substance charged that the deceased was engaged in the fastening of "one end of a guy ~~xxxx~~ wire to an iron band that encircled and was clamped to" the smokestack; the original declaration made no reference to the band referred to. Under the evidence the jury were fully warranted in concluding that the band which the Hamler Company was employed to remove and repair and then replace around the smokestack, was a part of the smokestack itself. We are also of the opinion that the declaration as amended did not state a new cause of action against the defendant, and that the plea of the statute of limitations did not lie against the charge of negligence made in either the original or amended declaration.

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In the cases just cited it appeared that the injured persons were the ones referred to in the cases - which were not in their minds intended for the use they were in fact put to - on the express invitation of the defendants, and in this respect they differ from the case at bar. We are inclined to the view, however, that here there was an implied invitation extended to deceased to use a way which was intended to be and in fact was generally by persons who, in the course of their employment, were required to go to the rear of the building.

After verdict the court allowed plaintiff to amend the declaration. [illegible] that the deceased, while going for his [illegible], was engaged in and "about the placing and repair of [illegible] elevator." As amended, the declaration [illegible] particularly the particular thing in and about the [illegible] upon the deceased was employed. [illegible] in substance charged that the deceased was employed in the [illegible] "use and of a gas xxxx wire to an [illegible] and was charged to" the [illegible]; the additional [illegible] tion made no reference to the [illegible]. [illegible] evidence the jury [illegible] the [illegible] and repair [illegible] part of the [illegible]. [illegible] that the declaration [illegible] of action against the [illegible], [illegible] statute of limitations [illegible] negligence [illegible] tion.

It is urged as a ground for reversal of the judgment that the court refused to permit defendant to file certain pleas to plaintiff's amended declaration. One of these pleas, in substance, was that deceased and the Hamler Company had elected to be bound by the Workmen's Compensation Act of 1911; that under section 2 of the act the Hamler Company, by reason of the death of deceased, became liable to pay to his surviving widow and children the compensation provided in the act; that the plaintiff, on behalf of such widow and children, had received and was then receiving from the said Hamler Company the compensation so provided. It was admitted at the trial that the compensation paid plaintiff under the act amounted to $1,287.

In Borgnis v. Falk Co., 133 N. W. (Wis.) 209, it was said by the court, speaking through Chief Justice Winslow:

> "that the personal injury action brought by the employe against his employer to recover damages for injuries sustained by reason of the negligence of the employer had wholly failed to meet or remedy a great economic and social problem which modern industrialism has forced upon us, namely, the problem of who shall make pecuniary recompense for the toll of suffering and death which that industrialism levies, and must continue to levy, upon the civilized world. * * * To speak of the common law personal injury action as a remedy for this problem is to jest with serious subjects, to give a stone to one who asks for bread. The terrible economic waste, the overwhelming temptation to the commission of perjury, and the relatively small proportion of the sums recovered which comes to the injured parties in such actions, condemn them as wholly inadequate to meet the difficulty."

The theory of most, if not quite all, of the compensation acts of recent years is that the industry in which an injured workman is engaged should bear a just proportion of any loss sustained by reason of injuries received by such workman in the course of his employment, regardless of the manner in which the injury was received. Due to inadequacy of the pre-existing common law and statutory remedies, society had become charged with the support of an immense number of dependent and disabled persons because of injuries

It is urged as a ground for reversal of the judgment that the court refused to permit defendant to file certain pleas to plaintiff's amended declaration. One of these pleas, in substance, was that deceased and the Hamler Company had elected to be bound by the workmen's compensation Act of 1911; that under section 2 of the act the Hamler Company, by reason of the death of deceased, became liable to pay to his surviving widow and children the compensation provided in the act; that the plaintiff, on behalf of such widow and children, had received and was then receiving from the said Hamler Company the compensation as provided. It was admitted at the trial that the compensation paid plaintiff under the act amounted to $1,287.

In Morgris v. Rail Co., 133 N. E. (Wis.) 206, it was said by the court, speaking through Chief Justice Winslow:

> "that the personal injury action brought by the employe against his employer to recover damages for injuries sustained by reason of the negligence of the employer had wholly failed to meet or remedy a great economic and social problem which modern industrialism was forced upon us. Namely, the problem of the small but possibly necessary expense for the toll of suffering and death which that industrialism involves, and must continue to pay, upon the civilized world. * * * To speak of the common law personal injury action as a remedy for this problem is to jest with serious subjects, to give a stone to one who cries for bread. The terrible economic waste, the overwhelming temptation to the commission of perjury, the relatively small proportion of the sums recovered which come to the injured parties in such actions, can only show us how inadequate to meet the situation."

The theory of work, if not rules all, of the compensation acts of recent years is that the liability in which an injured workman is engaged entitle him to a just proportion of any loss sustained by reason of injuries received by such workman in the course of his employment, irrespective of the manner in which the injury was received. As the inadequacy of the pre-existing common law and statutory provisions, courts had become charged with the duty of the increase number of dependent and crippled persons by causes of injuries

sustained by employes in particular trades or callings; in cases arising before the enactment of compensation laws rigid rules of law compelled an employe plaintiff to stand prepared to show that he was in no way guilty of negligence contributing to the accident which brought about his injury, and he was further hampered by the rules relating to assumption of risk and of the negligence of fellow servants.

Section 3 of the Compensation Act of 1911 provides that -

> "No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee other than the compensation herein provided shall be available to any employee who has accepted the provisions of this act or to any one wholly or partially dependent upon him or legally responsible for his estate."

It is conceded that deceased's death was brought about as the result of injuries sustained by him while engaged in the line of his duty as an employe of the Hamler Company, and that plaintiff has received the compensation above referred to. The question for determination here, then, is whether plaintiff is barred from any further recovery of compensation by reason of the loss resulting from the death of deceased, which death the jury found was occasioned by and through the negligence of the defendant. The compensation which plaintiff in fact received from the Hamler Company cannot be said to be a full compensation for the loss which she sustained by reason of the death of deceased. The theory of the Compensation Act of 1911 is not that of full compensation for losses sustained. In the exercise of a sound public policy the law has, within recent years, charged the industries in which workmen are employed with a share of the losses resulting

sustained by employes in particular trades or callings; in cases arising before the enactment of compensation laws rigid rules of law compelled an employe plaintiff to stand prepared to show that he was in no way guilty of negligence contributing to the accident which brought about his injury, and he was further hampered by the rules relating to assumption of risk and of the negligence of fellow servants.

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It is conceded that compensation such as brought about as the result of injuries sustained by him while engaged in the line of his duty as an employe of the Kimber Company, and that he fully has received the compensation above referred to. The question now under consideration here, then, is whether plaintiff is barred from any further recovery of damages at common law in the case resulting from the death of [illegible] which the jury found was occasioned by [illegible] of the defendant. The compensation [illegible] received from the Kimber Company [illegible] compensation for the loss which [illegible] of the death of deceased. The theory [illegible] of 1911 is not that of full compensation [illegible] tained. In the exercise of a sound [illegible] by the law, within recent years, changed the [illegible] which workmen are employed with a share of the losses resulting in

from injuries to such workmen.

Section 3 of the Compensation Act of 1911 abolishes the common law or statutory right to recover damages for injuries or death sustained by an employe while engaged in the line of his duty as such employe, and it is urged that this precludes the plaintiff in this case from a recovery against the defendant, on the theory that plaintiff's whole right of recovery is limited to the compensation provided by the Compensation Act. We do not regard this contention as sound. When consideration is given to the remedy which the legislature sought to provide by the act, and when regard is had to the conditions which led to the enactment of the law in question, it is obvious that the legislature intended to establish a reform of the pre-existing legal relations between employes and employers. The purpose of the act was to charge the industries with the burden of paying some compensation to all persons, or their dependents, who came within the classes of persons to be benefitted by the act.

Section 17 of the act provides as follows:

> "(a) The employee or beneficiary may take proceedings both against that person to recover damages and against the employer for compensation, but the amount of the compensation which he is entitled to under this act shall be reduced by the amount of damages recovered.
>
> "(b) If the employee or beneficiary has recovered compensation under this act, the employer by whom the compensation was paid or the person who has been called upon to pay the indemnity under Sections 4 and 5 of this act, may be entitled to indemnity from the person so liable to pay damages as aforesaid, and shall be subrogated to the rights of the employee to recover damages therefor."

Under other provisions of the act the employer is charged with the payment of compensation to beneficiaries, in amounts limited by the act itself. We are inclined to the view that the Compensation Act has abrogated the plaintiff's right to recover under the statutes or the common law

from injuries to such workmen.

Section 5 of the Compensation Act of 1911 abolishes the common law or statutory right to recover damages for injuries or death sustained by an employee while engaged in the life of his duty as such employee, and it is urged that this precludes the plaintiff in this case from a recovery against the defendant, on the theory that plaintiff's whole right of recovery is limited to the compensation provided by the Compensation Act. We do not regard this construction as sound. When consideration is given to the remedy which the legislature sought to provide by the act, and when regard is had to the conditions which led to the enactment of the law in question, it is obvious that the legislature intended to substitute a reform of the pre-existing legal relations between employee and employers. The purpose of the act was to charge the industries with the burden of paying some compensation to all persons, or their dependents, who come within the class of persons to be benefitted by the act.

Section 17 of the act provides as follows:

> "(a) The employee or beneficiary may take proceedings both against that person to recover damages and against the employer for compensation, but the amount of the compensation will be applied to under this act shall be reduced by the amount of damages recovered.
>
> "(b) If the employee or beneficiary has recovered compensation under this act, the employer be when the compensation was paid or the person who has been called upon to pay the indemnity under sections 4 and 5 of this act, may be required to indemnify from the person so liable to any damages as aforesaid, and shall be subrogated to the rights of the employee to recover damages therefor."

Under other provisions of the act the employer is charged with the payment of compensation to dependents in amounts limited by the act itself. We are inclined to the view that the compensation act has abrogated the plain-

as they existed prior to the enactment of the Compensation Act of 1911, as against deceased's employer only; that her right to an action for damages as against third persons has not been affected, except that insofar as the employer has in fact paid or is legally liable to pay compensation, under the act, to the plaintiff, such employer may be subrogated to the rights of the plaintiff as against the defendant. We do not believe that the legislature intended by limiting the amount which the law compelled the employer in this case to pay, to deprive the plaintiff of her full right of recovery for all damages she has sustained by reason of the wrongful act of defendant.

The Compensation Act was intended to provide compensation for loss sustained in all cases coming within the terms of the act. The theory was to shift responsibility for the support of injured persons and their dependents, in part from society to the industries in which such injured persons were employed, and it is more in consonance with one's sense of justice to believe that the legislature had no thought of depriving a plaintiff of his common law or statutory right of action against a third person wrongdoer by reason of the passage of this act. We do not understand how this construction of the act will lead to a double or treble recovery in certain cases, as insisted upon by counsel for defendant. Where compensation has been received, as in this case, section 17 of the act permits the employer to be subrogated to the rights of the plaintiff as against the defendant. A different construction of the act would, in many cases where injuries had resulted from a wrongful act of a person not an employer, result in an injustice to a person injured, or his dependents, and would further, in cases, amount to a partial release of a

as they existed prior to the enactment of the Compensation Act of 1911, as against decedent's employer only; that her right to an action for damages as against third persons has not been affected, except that inasmuch as the employer has in fact paid or is legally liable to pay compensation, under the act, to the plaintiff, such employer may be subrogated to the rights of the plaintiff as against the defendant. We do not believe that the legislature intended by limiting the amount which the law compelled the employer in this case to pay, to deprive the plaintiff of her full right of recovery for all damages she has sustained by reason of the wrongful act of defendant.

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wrongdoer from liability for his wrongful act.

Paragraph "b" of section 17 of the act provides that "if the employee or beneficiary has recovered compensation * * the employer by whom the compensation was paid * * may be entitled to indemnity * * and shall be subrogated to the rights of the employee to recover damages therefor." This language, as we read it, means that the employer is entitled to indemnity, that is,he is entitled to be subrogated to the rights of the employee to the extent that he, the employer, has been required to pay compensation under the act. This, it seems to us, is the only reasonable construction that the language of this paragraph of the act will bear. The right to indemnity is the right that the law gives the employer to be subrogated not to all of the rights of the employe against a third person, but only as to so much of the employe's rights as will furnish indemnity for any loss sustained by the employer because of the provisions of the act.

If our construction of this act be correct, then the plaintiff in this case will not be permitted to receive or retain any compensation as against the Hamler Company in the event that the judgment against the defendant is paid to plaintiff. Directly or indirectly, the Hamler Company is entitled to be subrogated to the rights of plaintiff in and to an amount equal to any sum which it has paid or which it shall become liable to pay to her under the Compensation act of 1911.

It is true, as urged, that it was intended by the enactment of the compensation act that compensatian should be provided for every case coming within the terms of the act, and, this being so, we think that compensation

wrongdoer from liability for his wrongful act.

Paragraph "b" of section 17 of the act provides that "if the employee or beneficiary has recovered compensation * * the employer by whom the compensation was paid * * may be entitled to indemnity * * and shall be subrogated to the rights of the employee to recover damages therefor." This language, as we read it, means that the employer is entitled to indemnity, that is, he is entitled to be subrogated to the rights of the employee to the extent that he, the employer, has been required to pay compensation under the act. It, it seems to us, is the only reasonable construction that the language of this paragraph of the act will bear. The right to indemnity is the right that the law gives the employer to be subrogated not to all of the rights of the employee against a third person, but only so much of the employee's rights as will furnish indemnity for any loss sustained by the employer because of the provisions of the act.

If our construction of the act be correct, then the plaintiff in this case will not be entitled to recover or retain any compensation against the master company in the event that the employee against whom damages is paid to plaintiff, directly or indirectly, the master company is entitled to be reimbursed in the amount of plaintiff's one to an amount equal to any sum which it has paid or which it would become liable to pay to her under the compensation act of 1911.

It is true, as urged, that it may be argued by the enactment of the compensation act that compensation should be provided for every case coming within the terms of the act, and, this being so, no doubt most compensation

may be paid and a recovery of damages also be had in cases arising under the act; but the act itself does provide means whereby injustice to an employer may be prevented. Our construction of the act is that the plaintiff is entitled to but one complete satisfaction of her claim for damages; and that where that claim for damages arises from a tortious act of a third person, and a part thereof is paid by an employer, the employer may, by properly asserting his right of subrogation under the act, protect himself from any unfairness or injustice.

Our attention has been called to a recent decision of the Supreme Court of the State of Illinois in the case of Emma Keeran, Admx.,v. Peoria, B. & C. T. Co., filed in that court February 21, 1917, which dealt with a construction of the Workmen's Compensation Act, as amended in 1913. Section 17 of the act of 1911, referred to here, was definitely modified by section 29 of the act of 1913. Section 29 provides, in substance, that where an injury or death is caused under circumstances creating a legal liability for damages in some person other than an employer, such other person having elected to be bound by the act, the right of the employe or his representative to recover against such other person "shall be subrogated to his employer." It will be noted that this language of section 29 expressly provides for subrogation to the rights of an injured employe or his representative, by an employer who had paid compensation under the act, where "such other person" has "also elected to be bound by this act." Section 17 of the act of 1911 contains no such language, and we think it is inferable from other language in section 29 that the legislature recognized that prior to the enactment of that section, and under the act of 1911, an employe in-

may be paid and a recovery of damages also be had in cases arising under the act; but the act itself does provide means whereby injuries to an employee can be prevented. Our construction of the act is that the only relief is against one employer and that where that claim for damages; and that where that claim for damages arises from a tortious act of a third person, who is neither in paid by an employer, the employee may properly securing his right of subrogation under the act, protect himself from any unfairness or injustice.

Our attention has been called to a recent decision of the Supreme Court of the State of Illinois in the case of Jesse Jensen, Appellee, v. Jewell, et al., Appellees, filed in that court January 21, 1921, which deals with a construction of the workmen's compensation act, as amended in 1919. Section 17 of the act of 1911, referred to here, was definitely modified by section [illegible] of 1921. Section 29 provides, in substance, that where an injury or death is caused under circumstances creating a legal liability for damages in some person [illegible] other than the employer, the injured employee, or his dependents in case of death, may at their option proceed against the person so liable in damages, but if they elect to proceed against the employer, they must do so within the time fixed by the act. In the case of Jensen, the employee was injured while [illegible] "Jewell" was [illegible] 17 of the act of 1911 [illegible] claim it is interesting to note that the Illinois Supreme Court has legislative [illegible] of that section, and [illegible]

jured through the wrongful act of a third person would have his right of action against such third person, notwithstanding an award of compensation from his employer for such injury under the act of 1911.

It is complained that other errors were committed by the trial court in refusing defendant leave to file pleas, and in giving and refusing to give certain instructions. We have examined the record and briefs of counsel with reference to these questions, and we do not think that any error was committed by the trial judge with reference thereto that would warrant a reversal of the judgment.

Finding no reversible error in the trial of the case, the judgment of the Superior Court will be affirmed.

AFFIRMED.

jured through the wrongful act of a third person would have his right of action against such third person, notwithstanding an award of compensation from his employer for such injury under the act of 1911.

It is complained that other errors were committed by the trial court in refusing defendant leave to file pleas, and in giving and refusing to give certain instructions. We have examined the record and briefs of counsel with reference to these questions, and we do not think that any error was committed by the trial judge with reference thereto that would warrant a reversal of the judgment.

Finding no reversible error in the trial of the case, the judgment of the Superior Court will be affirmed.

AFFIRMED.

221 - 22651

JOHN STEVENS,
Appellee,

vs.

R. E. MOODY and HAROLD B. KLINE (Defendants)

On appeal of HAROLD B. KLINE,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court against R. E. Moody and Harold B. Kline, defendants, upon two collateral promissory notes for $1,500 each, payable six months after date to the order of the Fort Dearborn National Bank of Chicago. The defendant Moody was the maker of the notes, and the defendant Kline, on the back of the notes, guaranteed their payment.

In his affidavit of merits the defendant Kline set up by way of defense that there was no consideration for the notes, in that the sole purpose of their making and endorsement was to substitute them in the place and stead of two notes for the same amount, which, before the execution of the two notes in suit, had been made and endorsed by defendants, and that the substitution for which the notes in suit were executed was not in fact made; that the original notes were outstanding and had been protested for non-payment.

The notes in suit were introduced in evidence by the plaintiff, and in addition to the guaranty of Kline

221 - 22681

JOHN STEVENS, Appellee,	
vs.	
R. E. MOODY and HAROLD E. KLINE (Defendants)	
On appeal of HAROLD E. KLINE, Appellant.	

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE DAVIS DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court against R. E. Moody and Harold E. Kline, defendants, upon two collateral promissory notes for $1,500 each, payable six months after date to the order of the Fort Dearborn National Bank of Chicago. The defendant Moody was the maker of the notes, and the defendant Kline, on the back of the notes, guaranteed their payment.

In his affidavit of merits the defendant Kline set up by way of defense that there was no consideration for the notes, in that the sole purpose of their making and endorsement was to substitute them in the place and stead of two notes for the same amount, which, before the execution of the two notes in suit, had been made and endorsed by defendants, and that the substitution for which the notes in suit were executed was not in fact made; that the original notes were outstanding and had been protested for non-payment.

The notes in suit were introduced in evidence by the plaintiff, and in addition to the guaranty of Kline

bore on the back of each the following: "Without recourse . Fort Dearborn National Bank, by H. R. Kent, V. P."

The notes were made payable to the Fort Dearborn National Bank, and were by the bank endorsed in blank. We do not think that there is evidence in the record which would warrant this court in finding that plaintiff was not a holder of the notes for value, before maturity and without notice of any legal defense which Kline, who alone has brought the case here by appeal, had to an action on the notes as against the payee named therein; but even if it be assumed that plaintiff had no actual interest in the notes sued upon, he would still have the legal right to bring his action against the defendant.

In Lyman v. Kline, 128 Ill. App. 497, 500, this court, speaking through Mr. Justice Holdom, said: "It is well settled that where a note is endorsed in blank, suit may be brought in the name of any person who does not object, about which a defendant has no concern and cannot be heard to complain."

The only evidence tending to prove that Stevens was not a beneficial owner and holder of the notes in question was that of a witness who testified that Mr. Adams, Stevens' attorney, had said to him, the witness, that Mr. Stevens was the holder of the notes simply for purposes of suit. This testimony was objected to, and the objection overruled. We think the objection should have been sustained. We find no evidence which tends to prove that Adams had any authority to bind the plaintiff by the statement which he is alleged to have made; Stevens' right to the possession of, his interest in and his right to bring an action upon, the notes in question could not be limited by anything that

bore on the back of each the following: "Without recourse . Fort Dearborn National Bank, by H. J. Kent, V. P."

The notes were made payable to the Fort Dearborn National Bank, and were by the bank endorsed in blank. We do not think that there is evidence in the record which would warrant this court in finding that plaintiff was not a holder of the notes for value, before maturity and without notice of any legal defense which Kline, who alone has brought the case here by appeal, has to an action on the notes as against the payee named therein; but even if it be assumed that plaintiff had no actual interest in the notes sued upon, he would still have the legal right to bring his action against the defendant.

In Lyman v. Kline, 158 Ill. App. 497, 500, this court, speaking through Mr. Justice Holdom, said: "It is well settled that where a note is endorsed in blank, suit may be brought in the name of any person who does not object, about which a defendant has no concern and cannot be heard to complain."

The only evidence tending to prove that Stevens was not a beneficial owner and holder of the notes in question was that of a witness who testified that Mr. Adams, Stevens' attorney, had said to him, the witness, that Mr. Stevens was the holder of the notes simply for purposes of suit. This testimony was objected to, but the objection was overruled. We think the objection should have been sustained. We find no evidence which tends to prove that Adams had any authority to bind the plaintiff by the statement he is alleged to have made; Stevens' right to the possession of, his interest in and his right to bring an action upon, the notes in question could not be limited by anything that

Adams might have said, so far as this record discloses.

The defendant sought to defend as against his liability on the notes on the ground that there was no consideration for the notes in question, and that there had been a failure of such consideration. Under the circumstances these defenses might have been good as against the original payee, but on this record they cannot be urged as against the plaintiff in this suit. The defendant admits that he endorsed the notes in question at the time they were executed; that the notes were given in payment of two notes which prior to such endorsement had been in the hands of the Fort Dearborn National Bank; that the two earlier notes had become due in the hands of the bank and had been protested for nonpayment by it.

On the evidence presented by defendant there is no reason to believe that he had become or would become liable to make double payment on his endorsements. If suit should be brought by the bank upon the earlier notes, the action of the bank may be defeated by evidence of the judgment in this suit, and in that the record shows that the earlier notes were in the possession of the bank after maturity, there is no possibility that any other person may acquire such title to them as will prevent the defendant, in an action thereon, from pleading payment.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

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The defendant sought to defend on against his liability on the notes on the ground that there was no consideration for the notes in question, and that there had been a failure of such consideration. Under the circumstances these defences might have been good as against the original payee, but on this record they cannot be urged as against the plaintiff in this suit. The defendant admits that he endorsed the notes in question at the time they were executed; that the notes were given in payment of two notes which prior to such endorsement had been in the hands of the Fort Dearborn National Bank; that the two earlier notes had become due in the hands of the bank and had been protested for nonpayment by it.

On the evidence presented by defendant there is no reason to believe that he had become or would become liable to make double payment on his endorsements. If suit should be brought by the bank upon the earlier notes, the action of the bank may be defeated by evidence of the judgment in this suit, and in that the records show that the earlier notes were in the possession of the bank after maturity, there is no possibility that any other person may counter such title to them as will prevent the defendant, in an action thereon, from pleading payment.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

269 - 22703

THE VILLAGE OF GLENCOE,
Appellant,

vs.

ALBERT O. OLSON and MORTON T. CULVER,
Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

204 I.A. 453

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The complainant, Village of Glencoe, filed its bill of interpleader in the Circuit Court, in which it named Albert O. Olson and Morton T. Culver as defendants. The bill in substance alleged that the defendants were severally claiming ownership of or an interest in certain warrants or vouchers for the payment of money out of a certain special assessment fund in the possession of the complainant; that the complainant was unable to tell to whom the warrants should be delivered or the money paid; and prayed that the defendants be required to interplead and adjust in court their respective claims and rights in and to the warrants.

The defendants filed their separate answers to the bill. The defendant Olson in his answer claimed the exclusive right to the warrants, and the defendant Culver by his answer disclaimed any interest in said warrants, or either of them, or in the money to be paid on such warrants out of the special fund.

The defendant Culver filed a cross-bill in the suit, in which, inter alia, he alleged that he disclaimed any interest in the warrants in question, and further that he "denied that said warrants, or either of them, in any way represented the amount for which complainant is indebted to

THE VILLAGE OF GLENCOE, Appellant,	
vs.	APPEAL FROM CIRCUIT COURT,
ALBERT O. OLSON and MORTON T. OLIVER, Appellees.	COOK COUNTY.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The complainant, Village of Glencoe, filed its bill of interpleader in the circuit court, in which it named Albert O. Olson and Morton T. Oliver as defendants. The bill in substance alleged that the defendants were severally claiming ownership of or an interest in certain warrants or vouchers for the payment of money out of a certain special assessment fund in the possession of the complainant; that the complainant was unable to tell to whom the warrants should be delivered or the money paid; and prayed that the defendants be required to interplead and adjust in court their respective claims and rights in and to the warrants.

The defendants filed their separate answers to the bill. The defendant Olson in his answer disclaimed the exclusive right to the warrants, and the defendant Oliver by his answer disclaimed any interest in said warrants, or either of them, or in the money to be paid on such warrants out of the special fund.

The defendant Oliver filed a cross-bill in the suit, in which, inter alia, he alleged [illegible] any interest in the warrants in question, and that he "denied that said warrants, or either of them, in any way represented the amount for which complainant is indebted to

this defendant in said proceeding." It should be noted here that the allegation of the cross-complaint is not that the complainant is indebted to him in an amount greater than that represented by the warrants; his position is that he has no right or interest in or to the warrants in question, but that otherwise the complainant is indebted to him.

It is gathered from the pleadings and the facts disclosed by the evidence taken before the master to whom the case had been referred, that the Village of Glencoe had obtained by certain proceedings possession of what was described in the hearing as a special assessment fund, and that the Village had, by resolution adopted by its board of trustees, agreed to pay a certain percentage of the cost of the improvement for the doing of which the referred to special assessment fund was collected, by way of attorneys' fees for professional services to be rendered in the legal proceedings.

In the view we take of the questions involved in this case, we do not deem it necessary to recite here the rather intricate facts and the negotiations and the conversations as a result of which it is claimed by the defendant Culver that complainant had become indebted to him for certain services of value, which it is conceded were rendered by Culver in connection with the legal proceedings above referred to. Whether the complainant has by its conduct, or the conduct of its officials, become liable to the defendant Culver for the payment of any sum or sums of money may become an issue in other proceedings, and it is not intended to express any opinion here on this question further than to repeat that it is conceded that services of value have been rendered by Culver to the Village for which he has not up to this time been paid.

this defendant in said proceeding." It should be noted here that the allegation of the cross-complaint is not that the complainant is indebted to him in an amount greater than that represented by the warrants; his position is that he has no right or interest in or to the warrants in question, but that otherwise the complainant is indebted to him.

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On March 1, 1916, the court entered a decree in which, among other things, is recited:

> "And the court having considered said bill of complaint and the several answers of the defendants, and having heard the arguments of counsel and being fully advised in the premises, and the said defendant, Morton T. Culver, having by his said answer and here in open court disclaimed any interest in said warrants or either of them, and the money to be paid out on such warrants or either of them, and consenting thereto, it is ordered, adjudged and decreed that said warrants number 7122 for $1,003.25 and number 7123 for $918.74, both dated January 18, 1916, issued by the complainant, the Village of Glencoe, payable to the order of the defendant, Albert O. Olson, with interest, and heretofore on or about January 24, A. D. 1916, by the said complainant deposited with the Clerk of this Court, be by said Clerk delivered over to said defendant, Albert O. Olson."

On June 27, 1916, the court entered a second decree in the cause, in which it is recited, among other things -

> "That the defendant, Morton T. Culver, never made any claim to the warrants or vouchers brought into court herein by the complainant, or to any or either of them, before or subsequent to the filing of complainant's bill of complaint herein, and as to him complainant is not entitled to the relief in said bill of complaint prayed for, or any part thereof. The court further finds -
>
> "That all of the material allegations contained in the cross-bill of the cross-complainant, Morton T. Culver, are proven to be true in substance and in fact, as therein alleged, and that he is entitled to the relief therein prayed for."

It was further ordered and adjudged by the decree that the complainant pay to the defendant Culver the sum of $2,626.10 together with interest thereon from the date of entry.

Complainant by appeal brings the decree of June 27, 1916, here for review, and alleges as a principal reason for a reversal of the decree that the court had no jurisdiction to enter the decree on the cross-bill of the cross-complainant Culver.

Complainant's bill in substance alleges that complainant is in possession of two village warrants for the

On March 1, 1916, the court entered a decree in which, among other things, it recited:

"And the court having considered said bill of complaint and the several answers of the defendants, and having heard the arguments of counsel and being fully advised in the premises, and the said defendant, Norton T. Culver, having by his said answer and here in open court disclaimed any interest in said warrants or either of them, and the money to be paid out on such warrants or either of them, and consenting thereto, it is ordered, adjudged and decreed that said warrants number 7123 for $1,005.35 and number 7125 for $918.74, both dated January 12, 1916, issued by the complainant, the village of Glencoe, payable to the order of the defendant, Albert C. Olson, with interest, and heretofore on or about January 24, A. D. 1916, by the said complainant deposited with the Clerk of this Court, be by said Clerk delivered over to said defendant, Albert C. Olson."

On June 27, 1916, the court entered a second decree in the cause, in which it is recited, among other things -

"That the defendant, Norton T. Culver, never made any claim to the warrants or vouchers brought into court herein by the complainant, or to any or either of them, before or subsequent to the filing of complainant's bill of complaint herein, and as to him complainant is not entitled to the relief in said bill of complaint prayed for, or any part thereof. The court further finds -

"That all of the material allegations contained in the cross-bill of the cross-complainant, Lori M. Culver, are proven to be true in fact and in fact, as therein alleged, and that he is entitled to the relief therein prayed for."

It was further ordered and adjudged by the decree that the complainant pay to the defendant Lori M. Culver the sum of $2,923.10 together with interest thereon from the date of entry.

Complainant by appeal brings the record of June 27, 1916, here for review, and alleges as a material reason for a reversal of the decree that the court had no jurisdiction to enter the decree on the cross-bill of the cross-complainant Culver.

Complainant's bill in the case alleges that complainant is in possession of two village warrants for the

payment of money out of a special assessment fund, which warrants were made payable to the order of the defendant Olson; that both defendants, Olson and Culver, were claiming ownership, title or interest in and to the warrants and the money to be paid thereon; and complainant by its bill submits the question of the several contentions of the defendants concerning the warrants and the money represented thereby to the trial court for determination.

The subject matter of the suit, as shown by the bill, was the warrants, and these were deposited with the court pending a final order or decree in the cause. It was alleged in the bill that the complainant's only interest in the warrants and the funds represented thereby was that the warrants be turned over to the person legally entitled to them.

The bill, as we read it, contained all of the elements necessary to a bill of interpleader. No claim is made by complainant against either of the defendants other than that they adjust in court their several claims to the warrants or funds in question. The bill did, indeed, allege that the complainant had not contracted any independent liability with either defendant except as shown in the bill itself. This assertion may be taken to relate to the warrants and funds in question. Whether complainant is or is not otherwise indebted to either defendant is not material under the issues presented by the bill. The bill prayed for a decree fixing the rights of the respective defendants to the warrants, and as we view this phase of the controversy, the court had no power to adjudicate the other questions and issues presented by the cross-bill of the cross-complainant Culver. As stated, the complainant disclaimed any and all interest in the subject matter of the suit, and it is not asking for any

payment of money out of a special assessment fund, which warrants were made payable to the order of the defendant Olson; that both defendants, Olson and Miller, were claiming ownership, title or interest in and to the warrants and the money to be paid thereon; and complainant by its bill submits the question of the several contentions of the defendants concerning the warrants and the money represented thereby to the trial court for determination.

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affirmative relief against the defendants or either of them.

The complainant claims in its bill to be a mere stake holder; that it holds the subject-matter of the suit subject to the direction of the court, that it has no interest or claim thereto, and that it is asking for no affirmative relief against the defendants.

In Byers v. Sanson, 111 Ill. App. 578, the court approved the following quotation from an English case:

> "I have a fund in my possession in which I claim no interest and to which you, the defendants, set up conflicting claims. Pay me my costs and I will bring the fund into court and you shall contest it between yourselves."

In Morrill v. Manhattan Life Ins. Co., 82 Ill. App., pn page 417, the court said:

> "In an interpleader suit the complainant's office is widely different from that of the complainant in an ordinary suit in equity. * * * Here the complainant comes into court with the money in his hand to discharge an acknowledged debt * * *. It is true he must show by his bill that each of the parties claims a right, else he makes out no case, but that is his whole case, and when the court sees by the respective answers that such defendants have made such a claim, I can perceive no well grounded reason for putting the complainant to other proof."

It is essential to a bill of interpleader that the party seeking relief should have incurred no independent liability to either party with reference to the subject-matter of the suit; that he should have acknowledged the title of neither in respect to the specific property in dispute, and that he claims no interest in the subject-matter himself. Bispham's Principles of Equity, 5th Ed., Sec. 421. Where defendants interplead without objection and go to trial on the issues, it is too late to raise the objection that the case is not a proper one for a bill of

affirmative relief against the defendants or either of them.

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In Byers v. Sanson, 111 Ill. App. 572, the court approved the following quotation from an English case:

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It is essential to a bill of interpleader that the party seeking relief should have incurred no independent liability to either party with reference to the subject-matter of the suit; that he should have acknowledged the title of neither in respect to the specific property in dispute, and that he claims no interest in the subject-matter himself. Blackham's Principles of Equity, 5th Ed., Sec. 421. Where defendants interplead without objection and go to trial on the issues, it is too late to raise the objection that the case is not a proper one for a bill of

interpleader. Woodmen of the World v. Rutledge, 133 Cal. 640. No complaint is made by any of the parties to the case of the decree of March 1, 1916, and it is not urged that the bill of interpleader should have been dismissed on the filing of the separate answers of the defendants.

Irrespective of any other relations or contracts between the complainant and the defendants, the complainant had the right to appeal to a court of equity to protect it from the conflicting claims, - had there been such conflicting claims, - made by the defendants to the warrants or funds which constituted the subject- matter of the suit; and when by his answer the defendant Culver disclaimed any right or interest in and to the subject-matter, and when Olson, the other defendant, by his answer claimed the whole title and right to such subject-matter, which right or interest of Olson was in no sense denied by the complainant in its bill, a final decree should have been entered in the cause, which would have ended the litigation. Culver's disclaimer of interest in the subject-matter of the suit could not be regarded, and of course would not be urged, as res judicata of any other well founded claim that he might have against the complainant. No other claims were submitted under the pleadings prior to the filing of the cross-bill. The complainant sought the aid of the court to protect it, as it thought, from vexatious and expensive litigation, and as in legal effect all of the parties, by the bill and answers filed thereto, admitted the right of Olson to the whole subject-matter of the suit, this necessarily put an end to the case. The bill filed by complainant requested the court to determine the rights of the respective defendants to the money in the special assessment fund represented by the warrants.

interpleader. Woodman of the world v. Mallinger, 1[illegible] Ind. [illegible]. No complaint is made by any of the parties to the case of the decree of March 1, 1916, and it is not argued that the bill of interpleader should have been dismissed on the filing of the separate answers of the defendants.

Irrespective of any other relations or contracts between the complainant and the defendants, the complainant had the right to appeal to the court of equity to protect it from the conflicting claims, - had there been such conflicting claims, - made by the defendants to the warrant or funds which constituted the subject-matter of the suit; and when by his answer the defendant Oliver disclaimed any right or interest in and to the subject-matter, and when Oliver, the other defendant, by his answer disclaimed the sole title and right to such subject-matter, neither right or interest of Oliver was in no sense denied by the complainant in its bill, a final decree should have been entered in the court, which would have ended the litigation. Unless such answer of interest in the subject-matter of the suit could be regarded, and of course such [illegible] regarded, [illegible] of any other well founded claim [illegible] the complainant. In other words [illegible] liability [illegible] the bill [illegible] claimant against the [illegible] court [illegible] tion, [illegible] legal effect [illegible] filed [illegible] ject-matter of the suit, [illegible] case. The bill filed by complainant [illegible] to determine the rights of the respective defendants [illegible] in the special assessment fund [illegible] warrants.

If Culver has any other right or interest to other moneys of the special assessment fund, we can see no reason why his rights thereto may not be determined in some other proper proceeding.

The decree of June 27, 1916, will be reversed and the cause remanded with directions to dismiss the cross-bill of the defendant Culver without prejudice to any legal right which he may have to bring further action against the complainant, except as to the warrants and the moneys represented thereby involved in this cause.

REVERSED AND REMANDED
WITH DIRECTIONS.

If Oliver has any other right or interest to other moneys of the special assessment fund, we can see no reason why his rights thereto may not be determined in some other proper proceeding.

The decree of June 27, 1916, will be reversed and the cause remanded with directions to dismiss the cross-bill of the defendant Oliver without prejudice to any legal right which he may have to bring further action against the complainant, except as to the warrants and the moneys represented thereby involved in this cause.

REVERSED AND REMANDED

WITH DIRECTIONS.

280 - 22714

G. S. COPPOLA,
Appellee,

vs.

MARDEN, ORTH & HASTINGS COMPANY, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court against the defendant on a contract for the sale to plaintiff by defendant of 40 barrels of 50 gallons each of olive oil. It is contended by plaintiff that the contract provided for a 60 day credit; that defendant refused to deliver the oil to him on demand, and that plaintiff was compelled to go into the open market and purchase the oil at a much higher price than $1.30 per gallon agreed upon. The defendant insists that it had never closed a contract for the sale of the oil with plaintiff; that plaintiff gave his order for the oil to a traveling salesman of defendant, but that the salesman had no authority from defendant to extend credit to plaintiff, and that defendant was not bound by the promise of its agent to deliver the oil on 60 days' credit as alleged by plaintiff. The defendant further contends that even if it be assumed that a valid contract had been entered into by the parties, the damages of plaintiff for its breach would be limited to interest upon the contract price agreed upon for the 60 day period of credit.

Upon the trial of the case by the court without a jury, the court found the issues against the defendant

280 - 22714

G. S. COPPOLA, Appellee,	
vs.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
MARDEN, ORTH & HASTINGS COMPANY, a corporation, Appellant.	

MR. JUSTICE DAVIS DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court against the defendant on a contract for the sale to plaintiff by defendant of 40 barrels of 30 gallons each of olive oil. It is contended by plaintiff that the contract provided for a 60 day credit; that defendant refused to deliver the oil to him on demand, and that plaintiff was compelled to go into the open market and purchase the oil at a much higher price than $1.30 per gallon agreed upon. The defendant insists that it had never closed a contract for the sale of the oil with plaintiff; that plaintiff gave his order for the oil to a traveling salesman of defendant, but that the salesman had no authority from defendant to extend credit to plaintiff, and that defendant was not bound by the promise of its agent to deliver the oil on 60 days' credit as alleged by plaintiff. The defendant further contends that even if it be assumed that a valid contract had been entered into by the parties, the damages of plaintiff for its breach would be limited to interest upon the contract price agreed upon for the 60 day period of credit.

Upon the trial of the case by the court without a jury, the court found the issues against the defendant

and assessed plaintiff's damages at the sum of $1,537.50. Judgment was entered in favor of the plaintiff for this amount, and defendant brings the case here by appeal for review.

The defendant insists that there was no evidence from which the court was authorized to find that a contract had in fact been executed between the parties. There is much conflicting evidence in the record on this phase of the case. It is clear that defendant's salesman did have authority, as agent for the defendant, to solicit orders for oil from the plaintiff, and we are inclined to the opinion that there is evidence in the record which authorized the trial court to find that the agent had the implied authority to make the contract for the breach of which suit is brought. The correspondence introduced in evidence tended to show that the defendant intended to perform the contract made by its agent, and that its failure to do so was the result of a sudden and considerable increase in the market price of olive oil occurring shortly after the contract was made.

The trial court held as a proposition of law applicable to the facts of the case that -

> "when a seller of goods who has agreed to deliver the same upon a credit of sixty days, refuses afterwards to deliver them to the buyer, except for cash, the damages of the buyer are the difference between the contract and market price of the goods at the various times when and at the place where the goods should be delivered under the contract, and if the buyer is unable to mitigate the damages by paying cash, the measure of damages of the buyer are not limited to the interest for the sixty days period on the contract price, because of the fact that the seller offered to deliver said goods at the contract price for cash."

This same proposition in somewhat different form was held in other propositions. The court refused to hold as a proposition of law applicable to the case -

and assessed plaintiff's damages at the sum of $1,527.50. Judgment was entered in favor of the plaintiff for this amount, and defendant brings the case here by appeal for review.

The defendant insists that there was no evidence from which the court was authorized to find that a contract had in fact been executed between the parties. There is much conflicting evidence in the record on this phase of the case. It is clear that defendant's salesman did have authority, as agent for the defendant, to solicit orders for oil from the plaintiff, and we are inclined to the opinion that there is evidence in the record which authorized the trial court to find that the agent had the implied authority to make the contract for the breach of which suit is brought. The correspondence introduced in evidence tended to show that the defendant intended to perform the contract made by its agent, and that its failure to do so was the result of a sudden and considerable increase in the market price of olive oil occurring shortly after the contract was made.

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"When a seller of goods who has agreed to deliver the same upon a credit of sixty days, refuses afterwards to deliver them to the buyer, except for cash, the damages of the buyer are the difference between the contract price and the price of the goods at the various times when and at the place where the goods should be delivered under the contract, so if the buyer is unable to mitigate the damages by buying cash, the measure of damages of the buyer are not limited to the interest for the sixty day period on the amount paid, because of the fact that the seller refused to deliver said goods at the contract price on cash."

This same proposition in somewhat different form was held in other propositions. The court refused to hold as a proposition of law applicable to the case -

"that money, like the staples of commerce, is in legal contemplation always in the market and procurable at the lawful rate of interest; and that as a matter of law, the difference in the cost of an article payable at a certain price in cash on delivery, and the cost of the same article for the same purchase price payable in sixty days' time, is the interest at the lawful rate on said purchase price for said sixty days' period."

It is insisted by the defendant that the court erred in holding the proposition of law first above referred to, and in refusing to hold the proposition of law last above quoted, as applicable to the case. We are inclined to agree with the position of counsel for defendant on this question. It was conceded on the trial of the case that the defendant was ready at all times during the period of the year within which the contract was to be performed to sell and deliver to plaintiff the olive oil contracted for, for cash, at the contract price of $1.30 per gallon. In giving his testimony the plaintiff stated that he had money in the bank with which he could, had he seen fit to do so, purchase oil during the year in question, although later in his testimony he denied this statement and insisted that he did not have money with which to buy for cash the oil contracted for. He does testify, however, that at various times during the year he bought, in all, 45 gallons of oil in the market, at prices varying between $1.85 and $2.20 per gallon - and this notwithstanding the fact that it is conceded in the record that he could at all times during that year have purchased the oil from defendant at the contract price of $1.30 per gallon. Even if his last statement as to his lack of ready money to enable him to purchase the oil for cash be true, we are not impressed with the argument that in fairness he should be awarded as his damages the difference between the contract price of $1.30 per gallon and the price which plaintiff says he actually paid for the oil in the open market. Plaintiff had been in the business of buying

> "that money, like the staples of commerce, is in legal contemplation always in the market and procurable at the lawful rate of interest; and that as a matter of law, the difference in the cost of an article payable at a certain price in cash on delivery, and the cost of the same article for the same purchase price payable in sixty days' time, is the interest at the lawful rate on said purchase price for said sixty days' period."

It is insisted by the defendant that the court erred in holding the proposition of law first above referred to, and in refusing to hold the proposition of law last above quoted, as applicable to the case. We are inclined to agree with the position of counsel for defendant on this question. It was conceded on the trial of the case that the defendant was ready at all times during the period of the year within which the contract was to be performed to sell and deliver to plaintiff the olive oil contracted for, for cash, at the contract price of $1.30 per gallon. In giving his testimony the plaintiff stated that he had money in the bank with which he could, had he seen fit to do so, purchase oil during the year in question, although later in his testimony he denied this statement and insisted that he did not have money with which to buy for cash the oil contracted for. He does testify, however, that at various times during the year he bought, in all, 40 gallons of oil in the market, at prices varying between $1.85 and $2.20 per gallon - and this notwithstanding the fact that it is conceded in the record that he could at all times during that year have purchased the oil from defendant at the contract price of $1.30 per gallon. Even if his last statement as to his lack of ready money to enable him to purchase the oil for cash be true, we are not impressed with the argument that in fairness he should be awarded as his damages the difference between the contract price of $1.30 per gallon and the price which plaintiff says he normally paid for the oil in the open market. Plaintiff had been in the business of buying

and selling olive oil in the market for a period of 30 years, and it is not easy to believe his statement that he in fact paid $1.85 to $2.20 per gallon for oil which it is conceded he could, at the same time, have procured for cash at the price of $1.30 per gallon.

> "A party injured by a breach of contract must make reasonable exertions to render the injury as light as possible; and he cannot recover for any loss which he might have avoided with ordinary care and reasonable expense. This rule is especially applicable where one of the contracting parties has acquired notice of the breach of contract and makes no reasonable effort to mitigate the damages claimed." 13 Cyc. 72.

Clearly it was the duty of plaintiff, on the breach of his contract with the defendant, to use every reasonable effort to minimize the damages accuring to him as the result of such breach. As a prudent business man, experienced in the particular kind of business which formed the subject matter of the contract, he could without great difficulty have found persons or banks ready and willing to loan sufficient money to him to enable him to purchase the oil in question, on the security of his contract with the defendant, or of the oil which it is conceded the defendant would have delivered for cash at the low contract price.

The rule seems to be well established by authority that where one who has agreed to deliver personal property under the terms of a contract for the sale of such property on credit, refuses to deliver such property for credit, but does stand ready to make delivery upon the terms of the contract for cash, the measure of damages to the vendee under such circumstances is the legal rate of interest upon the contract price of the property in question for the period of time for which credit was to be extended. Mechem on Sales, secs. 1754-55.

In Warren v. Staddart, 105 U. S. 224, the court said:

and selling olive oil in the market for a period of 30 years, and it is not easy to believe his statement that he in fact paid $1.85 to $2.20 per gallon for oil which it is conceded he could, at the same time, have procured for cash at the price of $1.50 per gallon.

> "A party injured by a breach of contract must make reasonable exertions to render the injury as light as possible; and he cannot recover for any loss which he might have avoided with ordinary care and reasonable expense. This rule is especially applicable where one of the contracting parties has acquired notice of the breach of contract and makes no reasonable effort to mitigate the damages claimed." 13 Cyc. 72.

Clearly it was the duty of plaintiff, on the breach of his contract with the defendant, to use every reasonable effort to minimize the damages accruing to him as the result of such breach. As a prudent business man, experienced in the particular kind of business which formed the subject matter of the contract, he could without great difficulty have found persons or banks ready and willing to loan sufficient money to him to enable him to purchase the oil in question, on the security of his contract with the defendant, or of the oil which it is conceded the defendant would have delivered for cash at the low contract price.

The rule seems to be well established by authority that where one who has agreed to deliver personal property under the terms of a contract for the sale of such property on credit, refuses to deliver such property for credit, but does stand ready to make delivery upon the terms of the contract for cash, the measure of damages to the vendee under such circumstances is the legal rate of interest upon the contract price of the property in question for the period of time for which credit was to be extended. Archer on Sales, secs. 1754-55.

In Barron v. Studdert, 1 Ga. App. 274, the court said:

"The damages sustained by Warren because he did not get the thirty days' credit which he thinks he was entitled to, is not to be measured in that way. * * * * If Stoddart violated his contract with Warren in refusing to fill his orders except for cash, the measure of Warren's damages would be the interest for thirty days on the amount of cash paid on his orders."

The legal principle which seems to be applicable to cases similar to the one at bar is that stated in the authorities here referred to. While it may not be necessary to a decision of this case, we are inclined to believe, as asserted by Sutherland in his work on Damages, vol. 1, 3rd Ed., sec. 76, that "money, like the staples of commerce, is in legal contemplation, always in the market and procurable at the lawful rate of interest * * . No party's condition, in respect to the measure of damages, should be worse for having failed in his engagement to a person whose affairs are embarrassed than if the same result had occurred with one in prosperous or affluent circumstances."

Counsel for the plaintiff have called our attention to well considered cases which tend, in a measure, to support the propositions urged by plaintiff, but we are inclined to follow the authorities herein referred to.

The trial court erred in its application of a measure of damages to the facts of this case. Plaintiff is entitled only to the legal rate of interest upon the contract price for the merchandise which he had agreed to purchase from the defendant, for a period of 60 days; this would amount to the sum of $21.67.

The judgment of the Municipal Court is reversed and judgment is entered here in favor of the plaintiff for the sum of $21.67, with costs against plaintiff here and below.

REVERSED AND JUDGMENT HERE.

"The damages sustained by Warren because he did not get the thirty days' credit which he thinks he was entitled to, is not to be measured in that way. * * * * If Stoddart violated his contract with Warren in refusing to fill his orders except for cash, the measure of Warren's damages would be the interest for thirty days on the amount of cash paid on his orders."

The legal principle which seems to be applicable to cases similar to the one at bar is that stated in the authorities here referred to. While it may not be necessary to a decision of this case, we are inclined to believe, as asserted by Sutherland in his work on Damages, vol. 1, 3rd Ed., sec. 76, that "money, like the staples of commerce, is in legal contemplation, always in the market and procurable at the lawful rate of interest * * . No party's condition, in respect to the measure of damages, should be worse for having failed in his engagement to a person whose affairs are embarrassed than if the same result had occurred with one in prosperous or affluent circumstances."

Counsel for the plaintiff have called our attention to well considered cases which tend, in a measure, to support the propositions urged by plaintiff, but we are inclined to follow the authorities herein referred to.

The trial court erred in its application of a measure of damages to the facts of this case. Plaintiff is entitled only to the legal rate of interest upon the contract price for the merchandise which he had agreed to purchase from the defendant, for a period of 60 days; this would amount to the sum of $21.67.

The judgment of the Municipal Court is reversed and judgment is entered here in favor of the plaintiff for the sum of $21.67, with costs against plaintiff here and below.

REVERSED AND JUDGMENT HERE.

285 - 22719

GEORGE MEYER, doing business as GEORGE MEYER & CO.,
Appellee,

vs.

WESTERN COLD STORAGE COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court against the defendant for $735.09. The case was tried by the court without a jury.

It appears from the evidence that the plaintiff stored on different dates from November 21, 1913, to December 21, 1913, 6474 pounds of poultry in the warehouse of the defendant. This poultry was re-delivered by the defendant to the plaintiff on different dates between February 17, 1914, and June 22, 1915. It was alleged in the statement of claim filed by the plaintiff that the defendant had so handled and cared for the poultry in question that through its negligence it had become decayed and unfit for food purposes, and unmarketable. In the affidavit of merits filed by the defendant to plaintiff's claim, it was alleged that the plaintiff was indebted to defendant in the sum of $40.81 for storage charges for the poultry in question.

It is insisted on behalf of defendant that the evidence heard on the trial did not tend to prove that the defendant was guilty of any negligence in its care and handling of the poultry. The evidence submitted to the court by the plaintiff tended to show that the poultry was in good condition at the time it was delivered to the defendant. Plaintiff, testifying in his own behalf, stated that he was

285 - 22719

GEORGE MEYER, doing business as GEORGE MEYER & CO., Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
WESTERN GOLD STORAGE COMPANY, a corporation, Appellant.	

MR. JUSTICE MEYER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court against the defendant for $735.09. The case was tried by the court without a jury.

It appears from the evidence that the plaintiff stored on different dates from November 21, 1913, to December 21, 1913, 6474 pounds of poultry in the warehouse of the defendant. This poultry was re-delivered by the defendant to the plaintiff on different dates between February 17, 1914, and June 22, 1915. It was alleged in the statement of claim filed by the plaintiff that the defendant had so handled and cared for the poultry in question that through its negligence it had become damaged and unfit for food purposes, and unmarketable. In the affidavit of merits filed by the defendant to plaintiff's claim, it was alleged that the plaintiff was indebted to defendant in the sum of $40.81 for storage charges for the poultry in question.

It is unnecessary to detail the evidence heard on the trial. It is enough to state that the defendant was guilty of any negligence in its care and handling of the poultry. The evidence submitted to the court by the plaintiff tended to show that the poultry was in good condition at the time it was delivered to the defendant. Plaintiff, testifying in his own behalf, stated that he was

familiar with the usual practice of preparing poultry for cold storage; that the poultry in question, before it was delivered to the defendant, was scalded and picked, laid in ice water over night, and in the morning taken out and dried, and then packed in boxes and sent to a cooler; that this was the usual and customary practice of preparing poultry for cold storage; that he had examined the particular poultry in question before it was delivered to defendant, and that he had helped with its packing; that he had examined every box thereof, and that it was in good condition when it was delivered to defendant. A witness called by the defendant testified that he was an employe of defendant and had charge of deliveries to its warehouse; that it was his duty to examine goods that were offered for storage, and that he had accepted for defendant the poultry in question; that it was his duty to receive packages for storage, and "if they are off odor or off condition, to specify that on a receiving card. * * * I examined the number of packages received, but not the quality, and I mean when I say they are in off condition that is if the poultry is slippery or a bad odor. It is my duty to receive poultry over there, and if I notice poultry delivered in an off condition, I mark a memorandum receipt and issue it to the teamster in that manner. * * * I did not mark any of these receipts with a notation that they were slippery, or in other words, bad order."

The evidence satisfactorily shows that the poultry in question was in good condition at the time it was received by the defendant for storage, and there does not seem to be any evidence in the record which tends to show that the poultry was not in the deteriorated condition claimed by plaintiff at the times it was re-delivered to him; in other words, we think it is fairly inferable from all of the

familiar with the usual practice of preparing poultry for cold storage; that the poultry in question, before it was delivered to the defendant, was scalded and picked, laid in ice water over night, and in the morning taken out and drawn, and then packed in boxes and sent to a cooler; that this was the usual and customary practice of preparing poultry for cold storage; that he had examined the particular poultry in question before it was delivered to defendant, and that he had helped with its packing; that he had examined every box thereof, and that it was in good condition when it was delivered to defendant. A witness called by the defendant testified that he was an employe of defendant and had charge of deliveries to its warehouse; that it was his duty to examine goods that were offered for storage, and that he had accepted for defendant the poultry in question; that it was his duty to receive packages for storage, and "if they are not right or off condition, to specify that on a receiving card. * * * I examined the number of packages received, but not the quality, and I mean when I say they are in off condition that is if the poultry is dripping or a bad odor. It is my duty to receive poultry over there, and if I find poultry delivered in an off condition, I mark it on a card and receipt and leave it in the cooler in [illegible]. I did not mark any of these receipts with [illegible] they were dripping, or in other words, bad odor."

The evidence [illegible] poultry in question was in good condition [illegible] received by the defendant [illegible] seem to be any evidence [illegible] that the poultry was not in condition [illegible] by plaintiff at the time [illegible]; in other words, we think it is [illegible]

evidence heard at the trial that the defective condition of the poultry, whatever its cause, occurred during the time that it was in the possession of the defendant.

Paragraph 261, section 21, chapter 114, of the Revised Statutes of the State of Illinois, Hurd's 1916, 2122, provides as follows:

> "A warehouseman shall be liable for any loss or injury to goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care."

No claim is asserted that any special agreement was made between the parties for storage of the poultry in question, and the liability of defendant, if any, must depend upon the character of the care which the evidence tended to show was exercised in connection with the storage of the poultry.

It is earnestly insisted by counsel for defendant that the defendant, under the evidence in the record, cannot be charged with negligence in the performance of its contract with the plaintiff. From an examination of all the evidence in the record we are inclined to the view that whether defendant was or was not guilty of negligence, became a question of fact for the determination of the trial court, and that there was evidence heard at the trial from which the trial judge was warranted in his finding that the defendant had, in fact, been guilty of negligence. The evidence introduced by the defendant tended to show that the goods were properly kept in rooms 16 and 26 of warehouse "J", and that at no time was the temperature of such rooms allowed to become or remain above the freezing point. In rebuttal of this, the plaintiff testified that he had received a transfer notice which was introduced in evidence, that 2504 pounds of the

evidence heard at the trial that the defective condition of the poultry, whatever its cause, occurred during the time that it was in the possession of the defendant.

Paragraph 261, section 21, chapter 114, of the Revised Statutes of the State of Illinois, Hurd's 1919, 2122, provides as follows:

> "A warehouseman shall be liable for any loss or injury to goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care."

No claim is asserted that any special agreement was made between the parties for storage of the poultry in question, and the liability of defendant, if any, must depend upon the character of the care which the evidence tended to show was exercised in connection with the storage of the poultry.

It is earnestly insisted by counsel for defendant that the defendant, under the evidence in the record, cannot be charged with negligence in the performance of its contract with the plaintiff. From an examination of all the evidence in the record we are inclined to the view that whether defendant was or was not guilty of negligence, being a question of fact for the determination of the trial court, and that there was evidence heard at the trial tending to show the trial judge was warranted in his finding that the defendant had, in fact, been guilty of negligence. The evidence introduced by the defendant tended to show that the goods were properly kept in rooms 16 and 26 of warehouse "L", and that at no time was the temperature of such rooms allowed to become or remain above the freezing point. In rebuttal of this, the plaintiff testified that he had received a transfer notice

poultry had been transferred from warehouse "J", which was known as a "freezer," to warehouse "T", described by the witness as a "cooler." Much argument is made that under the statute above quoted a prima facie case was not made out by proof only of the sound condition of the goods at the time of storage, and also of the defective condition of the same goods at the time of re-delivery; that the law imposed upon the plaintiff in this case the burden of showing some act of negligence, either of commission or omission, which caused the deterioration of the poultry received for storage by defendant.

It is conceded with reference to the storage of personal property and merchandise generally, where it is shown by a bailor that such property is delivered to a bailee for storage in good condition, and is re-delivered to the bailor in bad condition, that a prima facie case of negligence is thereby made out, and that the burden of proof as to the cause of the defective condition thereafter shifts from the bailor to the bailee; but it is contended for the defendant, on the authority of the case of Patterson v. Wenatchee, 53 Wash. 155, and other cases, that this rule has no application to a case where the property is stored is perishable in its nature. It was held in the case of Patterson v. Wenatchee, supra, that,

> "It is within the common knowledge of all men that meat in storage will spoil, will become damaged through internal defects, or through the operation of natural causes. So that even though the meat in this case, when brought to the respondent's warehouse, was in first class condition, and the jury so believed, the loss and damage complained of might have occurred to some extent at least without negligence on the part of the bailee, and the instruction as given, not recognizing this fact nor providing for any qualification, was, in our opinion, error."

We are not quite certain that the learned judge who wrote the opinion in the above case is correct when he

poultry had been transferred from warehouse "J", which was known as a "freezer," to warehouse "T", described by the witness as a "cooler." Much argument is made that under the statute above quoted a prima facie case was not made out by proof only of the sound condition of the goods at the time of storage, and also of the defective condition of the same goods at the time of re-delivery; that the law imposed upon the plaintiff in this case the burden of showing some act of negligence, either of commission or omission, which caused the deterioration of the poultry received for storage by defendant.

It is conceded with reference to the storage of personal property and merchandise generally, where it is shown by a bailor that such property is delivered to a bailee for storage in good condition, and is re-delivered to the bailor in bad condition, that a prima facie case of negligence is thereby made out, and that the burden of proof as to the cause of the defective condition thereafter shifts from the bailor to the bailee; but it is contended for the defendant, on the authority of the case of Patterson v. Wenatchee, 33 Wash. 163, and other cases, that this rule has no application to a case where the property is stored is perishable in its nature. It was held in the case of Patterson v. Wenatchee, supra, that,

"It is within the common knowledge of all men that meat in storage will spoil, will become damaged through internal defects, or through the operation of natural causes. So there even though the rule in the case, when brought to the respondent's warehouse, was in first class condition, and the jury so believes, the loss and damage complained of might have occurred to some extent at least without negligence on the part of the bailee, and the instruction as given, not recognizing this fact nor providing for any qualification, was, in our opinion, error."

We are not quite certain that the learned judge who wrote the opinion in the above case is correct when he

states that it is within the common knowledge of all men that meat, when deposited in a warehouse in first class condition, might thereafter become damaged through internal defects or through the operation of natural causes, and without any negligence on the part of the bailee. The expert testimony heard on the trial of the case at bar tends to show that when perishable goods are received for cold storage, and are properly frozen at the time of receipt, no change occurs in such goods while kept in such frozen condition, and that if deterioration had, in fact, set in before storage, such deterioration would become arrested by the process of freezing. Whether perishable goods may be regarded as an exception to the rule above referred to applicable to other property and merchandise generally, we are of opinion that there is some evidence in this record from which the trial court was warranted in finding that the defendant had, in fact, been guilty of negligence. Our attention has not been called to any case determined by the courts of review of this State which passes upon the precise question here involved, but we are inclined to think that it would not be in the public interest to create the exception to the general rule applicable to bailments of personal property insisted upon by the defendant. The business of cold storage of perishable food products, within relatively recent years, has grown to large proportions. A large percentage of food products sold to the public is, for a greater or less period of time, stored in warehouses, and we can see no adequate reason why bailees of property and merchandise of this character should be made an exception to the long-existing and salutary rule applicable to bailments of personal property generally.

The measure of damages in a case such as the one at bar is the market value of the goods at the time they are

states that it is within the common knowledge of all men that meat, when deposited in a warehouse in first class condition, might thereafter become damaged through internal defects or through the operation of natural causes, and without any negligence on the part of the bailee. The expert testimony heard on the trial of the case at bar tends to show that when perishable goods are received for cold storage, and are properly frozen at the time of receipt, no change occurs in such goods while kept in such frozen condition, and that if deterioration had, in fact, set in before storage, such deterioration would become arrested by the process of freezing. Meat or perishable goods may be regarded as an exception to the rule above referred to applicable to other property and merchandise generally, we are of opinion that there is some evidence in this record from which the trial court was warranted in finding that the defendant was, in fact, been guilty of negligence. Our attention has not been called to any case determined by the courts of review of this state which passes upon the precise question here involved, but we are inclined to think that it would not be in the public interest to create the exception to the general rule applicable to bailments of personal property insisted upon by the defendant. The business of cold storage of perishable food products within relatively recent years, has grown to large proportions. A large percentage of food products sold to the public is, for a greater or less period of time, stored in warehouses, and we can see no adequate reason why bailees of property and merchandise of this character should be made an exception to the long-existing and entirely well applicable to bailments of personal property generally.

The measure of damages in a case such as the one at bar is the market value of the goods at the time they are

taken from the warehouse, less the charges for storage. Western Union Cold Storage Co. v. Ermeling, 73 Ill. App. 394. It is not clear just what rule for the measure of damages was applied by the trial court, but we are inclined to the view that there was sufficient evidence to warrant the court in finding, as it did, that the loss to the plaintiff by reason of the defective condition of the poultry was 11-1/2 cents a pound, the amount which seems to have been allowed by the trial judge. By computation it is evident that the trial court allowed the sum of $40.81 for storage charges claimed to be due from plaintiff to defendant.

Finding no error in the findings and judgment of the trial court, the judgment of that court will be affirmed.

AFFIRMED.

taken from the warehouse, less the charges for storage. Western Union Cold Storage Co. v. Kimeling, 73 Ill. App. 594. It is not clear just what rule for the measure of damages was applied by the trial court, but we are inclined to the view that there was sufficient evidence to warrant the court in finding, as it did, that the loss to the plaintiff by reason of the defective condition of the poultry was 11-1/2 cents a pound, the amount which seems to have been allowed by the trial judge. By computation it is evident that the trial court allowed the sum of $40.81 for storage charges claimed to be due from plaintiff to defendant.

Finding no error in the findings and judgment of the trial court, the judgment of that court will be affirmed.

AFFIRMED.

308 - 22742.

204 I.A. 474

WILLIAM T. MONROE, Appellee,	)	
vs.	)	APPEAL,
CLARE A. ORR, et al.,	)	CIRCUIT COURT,
BERTHA ORR, Appellant.	)	COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The cause on this appeal is the same as in Writ of Error Gen. No. 22616 and has been consolidated for hearing with that of the writ of error. The record in the error case is the same as that before us on this appeal. The parties in both causes are represented by the same counsel and the judgment against appellant here is for the same amount as that against the plaintiff in error in 22616. The abstract is of the same record and the briefs and arguments are the same as those filed in the writ of error case, except for the substitution of the name of appellant in place of that of Gustave A. Becker, plaintiff in error.

The opinion this day filed in case Gen. No. 22616 is decisive on every material point of the questions involved in this appeal. There is only one varying circumstance, which is, that while Gustave A. Becker testified, appellant did not. However, his testimony being offered on behalf of all the defendants, is on every material point equally binding upon appellant and her co-defendant in the trial court.

While the statement of values in the inventory might not bind appellant, still, as is inferable from our

308 - 22742.

WILLIAM E. MONROE,
Appellee,

vs.

CLARE A. ORR, et al.,
BERTHA ORR,
Appellant.

APPEAL,

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The cause on this appeal is the same as in Writ of Error Gen. No. 22616 and has been consolidated for hearing with that of the writ of error. The record in the error case is the same as that before us on this appeal.

The parties in both causes are represented by the same counsel and the judgment against appellant here is for the same amount as that against the plaintiff in error in 22616.

The abstract is of the same record and the briefs and arguments are the same as those filed in the writ of error case, except for the substitution of the name of appellant in place of that of Gustave A. Nelson, plaintiff in error.

The opinion this day filed in error Gen. No. 22616 is decisive on every material point of the questions involved in this appeal. There is only one varying circumstance, which is, that while Gustave A. Nelson testified, appellant did not. However, his testimony being offered on behalf of all the defendants, is on every material point equally binding upon appellant and her co-defendant in the trial court.

While the statement of values in the inventory might not bind appellant, still, as it is inferable from our

opinion *supra*, under the plea of *riens per descent* and the replication thereto. The falsity of that plea having been proven by testimony of both plaintiff's and defendants' witnesses, proof of the values of land descending from the ancestor to the defendant heirs was unnecessary.

For the reasons set forth herein and in the opinion *supra*, the judgment of the Circuit Court is affirmed.

AFFIRMED.

opinion supra, under the plea of riens per descent and the replication thereto. The falsity of that plea having been proven by testimony of both plaintiff's and defendants' witnesses, proof of the value of land descending from the ancestor to the defendant heirs was unnecessary.

For the reasons set forth herein and in the opinion supra, the judgment of the Circuit Court is affirmed.

AFFIRMED.

270 - 22704

JOHN LADLE, Jr., by JOHN LADLE, his next friend,
Appellee,

vs.

CITY OF CHICAGO, a municipal corporation, A. BENSON and EMMA BENSON, his wife,
Appellants.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

204 I.A. 475

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, the City of Chicago, from a judgment of $10,000 in an action for personal injuries. The declaration originally consisted of two counts, to which the two Bensons, defendants, interposed a general demurrer, and the City of Chicago a plea of the general issue. The demurrer was sustained and plaintiff took leave to amend but never did so. Subsequently the pleadings were amended by discontinuing as to the Bensons and the first count was instructed out of the case.

The second count avers that in front of No. 2132 West 25th street, Chicago, the City laid out and constructed a cinder sidewalk that was elevated a considerable distance, viz., about four feet above and in front of a lot which was vacant, and that the City had constructed a wooden fence or railing along such walk for the purpose of guarding and protecting persons lawfully upon the sidewalk from falling into the vacant lot from the sidewalk; that it was the duty of the City to use ordinary diligence to maintain and keep said fence or guard-rail in good repair so that persons lawfully on said sidewalk might escape injury; that defendants disregarded their duty in that regard and knowingly permitted the fence to become rotten and decayed and

270 - 22704

JOHN LANKE, Jr., by JOHN LANKE, his next friend, Appellee,	
vs.	APPEAL FROM SUPERIOR COURT,
CITY OF CHICAGO, a municipal corporation, A. BRUSCH and EMMA BRUSCH, his wife, Appellants.	COOK COUNTY.

OPINION

MR. JUSTICE HAINES DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, the City of Chicago, from a judgment of $10,000 in an action for personal injuries. The declaration, originally consisting of two counts, to which the two Brusch's, defendants, interposed a general demurrer, and the City of Chicago a plea of the general issue. The demurrer was sustained and plaintiff took leave to amend but never did so. Subsequently the pleadings were amended by dismissing as to the Brusch's and the first count was included out of the case.

The second count was then in form as follows: 2182 West 35th street, Chicago, the city lot and constructed a cinder sidewalk that was elevated a considerable distance, viz., about four feet above and in front of a lot which was vacant, and that the City had constructed a wooden fence or railing along such walk for the purpose of warning and protecting persons lawfully upon the sidewalk from falling into the vacant lot; that it was a duty of the City of the City to use ordinary care to maintain and keep said fence or guard-rail in good repair so that persons lawfully on said sidewalk might safely; that defendants disregarded their duty in such respects and negligently permitted the fence to become rotten and broken and

in bad condition for a long period of time, and that while plaintiff, on the 2nd of August, 1912, was, in the exercise of ordinary care for his own safety, walking along said sidewalk, owing to the negligence of defendant and the defective condition of the fence he fell off the sidewalk into the lot with great force and violence and was seriously injured.

It is insisted that the demurrer of the Bensons to the declaration disposed of the case as against the City also. This does not necessarily follow. The declaration may have stated a good cause of action against the City, but not a good cause of action against the other defendants.

Failure to amend the declaration after the sustaining of the demurrer against the Bensons operated as a discontinuance of the suit against them, which was afterwards made effective by an order dismissing them out of the case.

The evidence discloses that plaintiff, a very young lad, was playing upon the sidewalk in question and that childlike he was having a dispute with a little girl; that at the time the accident occurred he was sitting on the edge of the sidewalk above the vacant lot with his feet hanging over, and that the little girl with whom he was disputing thoughtlessly, we assume, and without realizing the consequences of her act, gave plaintiff a push which resulted in his falling into the lot and sustaining the injuries complained of.

These are the evidential facts regarding the accident as we find them from the proofs. These proofs vary materially and fail to prove in every essential particular the negligence charged in the declaration, which was that plaintiff, in the exercise of due care, was walking

in bad condition for a long period of time, and that while plaintiff, on the 2nd of August, 1912, was, in the exercise of ordinary care for his own safety, walking along said sidewalk, owing to the negligence of defendant and the defective condition of the fence he fell off the sidewalk into the lot with great force and violence and was seriously injured.

It is insisted that the demurrer of the bonsons to the declaration imposed on the court as against the City also. This does not necessarily follow. The declaration may have stated a good cause of action against the City, but not a good cause of action against the other defendants.

Failure to amend the declaration after the sustaining of the demurrer against the bonsons operated as a discontinuance of the suit against them, which was afterwards made effective by an order [illegible] them out of the case.

The evidence discloses that plaintiff, a very young lad, was [illegible] in [illegible] and that conditions [illegible] at the time he received [illegible] of the sidewalk above [illegible] over, and that [illegible] quantities of [illegible] in the facility, [illegible] complained of.

[illegible] accident [illegible] very [illegible] whether the [illegible] that plaintiff [illegible]

along the sidewalk, and owing to the negligence of defendant and the defective condition of the fence in front of the vacant lot, fell off the walk and was injured. Plaintiff himself testified that he was sitting down at the edge of the sidewalk near the fence; that his feet were hanging down in the adjoining lot, "and the girl came and she bumped me, pushed me, and I fell."

The accident is not attributable to the condition of the fence. The condition of the fence was not the proximate or primary cause of the accident. No negligence on the part of the City in any manner contributed in any degree to the accident. The accident resulted from plaintiff sitting upon the edge of the sidewalk and the little girl pushing him so that he fell from the walk into the lot. In no way can these events be traceable to any negligence on the part of the City in the maintenance of the sidewalk or the fence. These facts appeared from plaintiff's own proofs.

At the conclusion of the plaintiff's proofs the City moved for an instructed verdict in its favor and raised the question of variance between the allegata and probata. The motion to instruct was denied, to which ruling the City excepted. The ruling of the court refusing to instruct a verdict for the City, as requested, was reversible error. In the condition of the proofs there was no evidence supporting the negligence charged against the City in the declaration. The verdict and judgment are consequently contrary to the manifest weight of the evidence. It cannot be said that the injury to plaintiff was either the natural or probable result of the negligence of the City. Seith v. Commonwealth Electric Company, 241 Ill. 252.

along the sidewalk, and owing to the negligence of defendant and the defective condition of the fence in front of the vacant lot, fell off the walk and was injured. Plaintiff himself testified that he was sitting down at the edge of the sidewalk near the fence; that his feet were hanging down in the adjoining lot, "and the girl came and she bumped me, pushed me, and I fell."

The accident is not attributable to the condition of the fence. The condition of the fence was not the proximate or primary cause of the accident. No negligence on the part of the City in any manner contributed in any degree to the accident. The accident resulted from plaintiff sitting upon the edge of the sidewalk and the little girl pushing him so that he fell from the walk into the lot. In no way can these events be traceable to any negligence on the part of the City in the maintenance of the sidewalk or the fence. These facts appear from plaintiff's own proofs.

At the conclusion of the plaintiff's proofs the City moved for an instructed verdict in its favor and raised the question of variance between the pleadings and proofs. The motion to instruct was denied, to which ruling the City excepted. The ruling of the court refusing to instruct a verdict for the City, is regarded, as reversible error. In the condition of the proofs there is no evidence supporting the negligence charged against the City in the construction. The verdict was judgment are consequently contrary to the manifest weight of the evidence. It cannot be said that the injury to plaintiff was a mere natural or probable result of the negligence of the City. Grant v. Commonwealth Electric Company, 241 Ill. 4.

Under the pleadings and proofs no cause of action has been established against the City of Chicago; therefore the judgment of the Superior Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Under the pleadings and proofs no cause of action has been established against the City of Chicago; therefore the judgment of the Superior Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

FINDING OF FACT.

The Court finds as an ultimate fact that plaintiff failed to prove that defendant the City of Chicago was guilty of any negligence charged in the declaration.

270 - 22704

FINDING OF FACT.

The Court finds as an ultimate fact that plaintiff failed to prove that defendant the City of Chicago was guilty of any negligence charged in the declaration.

293 - 22727

WISCONSIN LIME AND CEMENT COMPANY, a corporation,
Appellee,

vs.

THOMAS A. REED et al.,
Appellants,
Appeal of FRANCIS W. JONES and BREMA M. JONES.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

204 I.A. 479

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is a bill to establish a mechanic's lien upon certain realty in Cook County owned by the defendants Francis W. and Brema M. Jones. A decree in accord with the recommendations of a master's report was entered granting the lien prayed for, $241.04, with interest thereon, and the realty owner defendants bring this appeal in an effort to reverse that decree.

The complainant was a dealer in brick, plaster and other building materials, and had sold to the defendant J. S. Reed materials part of which were used by Reed in his business as a contractor in a building for Francis W. and Brema M. Jones at 4232 Prairie avenue, Chicago, and part in what is designated as the "Harney job" at 4538 Forrestville avenue, Chicago.

Francis W. Jones was president of the German Oil and Chemical Company, and gave its check, payable to the order of complainant, for $416.10, signed by himself as president, to Thomas Reed, the father of J. S. Reed, who was interested with his son in the contracting business. It seems that this check, payable to complainant,

295 - 22727

WISCONSIN LIME AND CEMENT COMPANY, a corporation,
Appellee,

vs.

THOMAS A. REED et al.,
Appellants.
Appeal of FRANCIS W. JONES and BRENA M. JONES.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

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The complainant was a dealer in brick, plaster and other building materials, and had sold to the defendant T. S. Reed materials part of which were used by Reed in his business as a contractor in a building for Francis W. and Brena M. Jones at 4232 Fredric avenue, Chicago, and part in what is designated as the "barney job" at 4252 Kostenatville avenue, Chicago.

Francis W. Jones was president of the German Oil and Chemical Company, and gave its check, payable to the order of complainant, for $241.10, signed by himself as president, to Thomas Reed, the father of T. S. Reed, who was interested with his son in the contracting business. It seems that this check, payable to complainant,

was given by Jones to Reed as the result of a conversation between them as to the amounts that were then due subcontractors on the Jones Prairie avenue building. At this time the exact sum of $416.10 was due from Reed to complainant on the Harney job, and the check was delivered to complainant by Thomas Reed in payment of the amount due on that job. At that time there was due complainant for material sold Reed and used by him on the Jones job $241.04. The $416.10 check was directed by Thomas Reed to be applied by complainant in settlement of the Harney job account, and a waiver of mechanic's lien on that job was given, although it is said that a waiver had been previously given; be that as it may, we attach no significance to it as affecting the rights of the parties.

We judge from the record that at the time Jones gave Thomas Reed the $416.10 check payable to the order of complainant, there was more than that amount due to J. S. Reed for the Prairie avenue building job, so that the money represented by the check was in fact a payment on account of the indebtedness due J. S. Reed from Jones and was Reed's money, which he had a right to use in the payment of his debt to complainant on the Harney job. Consequently, Jones suffered no loss in the payment of this money to Reed.

Jones had the right to demand, as a condition of payment, a waiver of complainant's lien, but he made the payment without exacting such waiver and with at least the implied knowledge that complainant had such lien. When Jones discovered what he seems to have regarded as a mistake, he sought to have Reed adjust the matter by procuring complainant to apply so much of the $416.10 as was necessary to the extinguishment of the claim against the Prairie avenue

was given by Jones to Reed as the result of a conversation between them as to the amounts that were then due subcontractors on the Jones Prairie avenue building. At this time the exact sum of $416.10 was due from Reed to complainant on the Harney job, and the check was delivered to complainant by Thomas Reed in payment of the amount due on that job. At that time there was due complainant for material sold Reed and used by him on the Jones job $241.04. The $416.10 check was directed by Thomas Reed to be applied by complainant in settlement of the Harney job account, and a waiver of mechanic's lien on that job was given, although it is said that a waiver had been previously given; be that as it may, we attach no significance to it as affecting the rights of the parties.

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building, which complainant declined to do.

Some point is made of the fact that complainant served a notice of lien on the Harney job subsequent to receiving the German Oil and Chemical Company check. It seems that Reed had trouble in procuring payment from Harney; that the notice served was at the request of Reed, and in an effort to help Reed make the collection, but with the distinct understanding and statement that complainant would not pursue the notice farther or consent to changing in any manner the payment from the Harney job. We do not think this action tends to change the situation of the parties.

There never was any receding by complainant from its original position that it received the check in discharge of the amount due it on the Harney job. There was no contractual relationship between complainant and Jones. Whatever claims complainant might have had against the two Joneses for material sold by it to Reed and which was inwrought into the Prairie avenue building, rested solely in rights conferred by the Mechanic's Lien statute. There was nothing in the $416.10 check which carried with it notice to complainant of any limitation as to its application to the payment of any particular claim. When Reed received the check he did not receive it as the agent of Jones, but in payment of a debt to his son, whom he represented.

The decree of the Superior Court is affirmed.

AFFIRMED.

building, which complainant declined to do.

Some point is made of the fact that complainant served a notice of lien on the Harney job subsequent to receiving the German Oil and Chemical Company check. It seems that Reed had trouble in procuring payment from Harney; that the notice served was at the request of Reed, and in an effort to help Reed make the collection, but with the distinct understanding and statement that complainant would not pursue the notice further or consent to changing in any manner the payment from the Harney job. We do not think this action tends to change the situation of the parties.

There never was any recedding by complainant from its original position that it received the check in discharge of the amount due it on the Harney job. There was no contractual relationship between complainant and Jones. Whatever claims complainant might have had against the two Jones for material sold by it to Reed and which was incorporated into the Italia avenue building, rested solely in rights conferred by the Mechanic's Lien statute. There was nothing in the $410.10 check which carried with it notice to complainant of any limitation as to its application to the payment of any particular claim. When Reed received the check he did not receive it as the agent of Jones, but in payment of a debt to his son, whom he represented.

The decree of the Superior Court is affirmed.

AFFIRMED.

297 - 22731

GEORGE HOSIE,
Appellant,

vs.

LA SALLE, a corporation,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

204 I.A. 481

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Plaintiff's action is for personal injuries. On a trial before court and jury he prevailed by a verdict and judgment in his favor of $500. He prosecutes this appeal and asks for a reversal and a new trial for the sole and only reason that the award of damages is wholly insufficient.

Plaintiff's employment with defendant was that of an engineer. On the day of the accident a certain metal airduct pipe was being razed. For this job one Schmidt was the contractor, whom plaintiff was assisting in his work of demolition, and while so engaged a piece of the pipe tumbled down, hitting plaintiff on the head and creating a scalp wound. Plaintiff thereafter became, as he claims, nervous and suffered from trouble with his heart, all of which he ascribes to the accident, while there was much contrariety of testimony, medical and lay, as to whether the nervousness and heart troubles of plaintiff were attributable to the injuries sustained at the time of the accident or to a physical condition present in plaintiff before the accident.

If it shall be conceded that the defendant is liable in damages to plaintiff for the injuries sustained as a result of the accident to him while aiding in the demolition of the airduct, about which there is some doubt,

297 - 22731

GEORGE HOSIK, Appellant,	
vs.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.
LA SALLE, a corporation, Appellee.	

MR. JUSTICE HORTON DELIVERED THE OPINION OF THE COURT.

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If it shall be conceded that the defendant is liable in damages to plaintiff for the injuries sustained as a result of the accident to him while aiding in the demolition of the airduct, about which there is some doubt,

the question submitted to the jury was the amount of damages to be awarded plaintiff for injuries to his health traceable to the accident in question. On this question there was much conflict in the proof. There was evidence from which, if given credit by the jury, they might have rightfully concluded that plaintiff's heart troubles were constitutional and in no way attributable to the injuries suffered as the result of the accident. We are therefore not at liberty to disturb the jury's finding, sanctioned as it was by the trial Judge, unless we can say that the verdict is manifestly contrary to the probative force of the evidence. This we are unable to do.

Plaintiff has succeeded on every point made by him in the trial court. He is simply dissatisfied with the award of damages. The question of damages was in no degree minimized or affected by either the giving or refusal to give the instructions complained about. It therefore follows that if the objections urged to these instructions were well taken, they would not constitute error which would permit of a reversal of the judgment and the awarding of a trial de novo, for we have no right to assume that the giving or eliminating of the instructions complained about would have so changed the result as to have increased the damages awarded. A judgment will not be disturbed upon review for mere inadequacy of damages awarded unless it is apparent that the verdict was the result of passion or prejudice in the jury or of errors of law by the court. These elements we do not find present in the instant case. Harper v. Black Diamond Coal Co., 142 Ill. App. 594; Hartwell v. Black, 48 Ill. 301.

There is no reversible error in this record and the judgment of the Superior Court is affirmed.

AFFIRMED.

the question submitted to the jury was the amount of damages to be awarded plaintiff for injuries to his health traceable to the accident in question. On this question there was much conflict in the proof. There was evidence from which, if given credit by the jury, they might have rightfully concluded that plaintiff's heart troubles were constitutional and in no way attributable to the injuries suffered as the result of the accident. We are therefore not at liberty to disturb the jury's finding, sanctioned as it was by the trial judge, unless we can say that the verdict is manifestly contrary to the probative force of the evidence. This we are unable to do.

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There is no reversible error in this record and the judgment of the Superior Court is affirmed.

301 - 22735

GEORGE W. MURRAY,
Appellee,

vs.

ROBERT BURGESS et al.,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

204 I.A. 482

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The turmoil of this litigation arises from the disputed pedigree of a Percheron stallion named "Dardignan." The pleadings are much involved; a full statement of them is not necessary either to an understanding or decision of the case. The common counts are a part of the declaration under which the cause proceeded to trial, as well as of a bill of particulars in which is set forth the contract, the gravamen of this action. There are also additional and amended counts, pleas, original and additional, a plea of the general issue, replications to sundry pleas and similiter as to others; likewise demurrers, general and special, to many portions of such pleadings, both written and ore tenus. There were numerous rulings of the court upon these pleadings, none of which affected the rights of the parties or limited the proofs on the merits of the cause, so that we shall neither further refer to nor discuss them.

Preliminary to our decision we will state that we are of the opinion from the evidence, that whatever confusion may have arisen in the pedigree or registry of such pedigree of the stallion "Dardignan" is chargeable to defendants, for which plaintiff is in no manner responsible or answerable. No act of his, prior or subsequent to the making of the contract hereinafter referred to, contributed to the

301 - 22735

GEORGE W. MURRAY, Appellee,	
vs.	APPEAL FROM CIRCUIT COURT
ROBERT MURDERS et al., Appellants.	OF COOK COUNTY.

MR. JUSTICE HILLMAN DELIVERED THE OPINION OF THE COURT.

The turmoil of this litigation arises from the disputed pedigree of a Petcherson stallion named "Bradigman." The pleadings are much involved; a full statement of them is not necessary either to an understanding or decision of the case. The common counts are a part of the declaration under which the cause proceeded to trial, as well as of a bill of particulars in which is set forth the contract, the gravamen of this action. There are also additional and amended counts, pleas, original and additional, a plea of the general issue, replicators to sundry pleas and similiter as to others; likewise demurrers, general and special, to many portions of such pleadings, both written and oral terms. There were numerous rulings of the court upon these pleadings, none of which affected the rights of the parties or limited the proofs on the merits of the cause, so that we shall neither further refer to nor discuss them.

Preliminary to our decision herein we will state that we are of the opinion from the evidence, that whatever confusion may have arisen in the pedigree or registry of such pedigree of the stallion "Bradigman" is chargeable to defendants, for which plaintiff is in no manner responsible or answerable. No act of his, prior or subsequent to the making of the contract hereinafter referred to, contributed to the

confusion on this subject which the record discloses.

In April, 1909, defendants were importers of Percheron horses, doing business at Wenona, Illinois, and plaintiff was a farmer and stock raiser at Estherville, Iowa. During that month plaintiff went to defendants' place at Wenona and purchased from them the stallion "Dardignan," which defendants had bought in France as a Percheron, they representing to plaintiff that the stallion was registered in the French stud book and also by the Percheron Society of America. With the animal plaintiff received from defendants a certificate of his pedigree issued by the Percheron Society of America and also what purported to be a certificate of his registration in France. The Iowa State Board of Agriculture refused to issue a license to stand the stallion for the season of 1912, on the ground that there were alterations and erasures in the pedigree certificate, and that the description of the stallion therein had been tampered with. It will be readily seen that the value of the animal for breeding purposes depended upon his pedigree as registered in the French stud book and the Percheron Society of America, and that, consequently, the authenticity of such registrations was of great importance to the owner of the animal. There is much testimony as to the difficulties encountered in this regard, but we think they are of but little moment in this controversy, because in settlement of such controversies the contract in suit was entered into. The contract, the material portions of which we recite, is dated March 13, 1912, and executed by plaintiff and defendants. It commences:

> "Whereas, about April 10, 1909, George Murray of Estherville, Iowa, purchased from Robt. Burgess & Son of Wenona, Illinois, through Thomas Burgess, a stallion whose name was Dardignan * registered by the Percheron Society of America, and whereas confusion exists as to

confusion on this subject which the record discloses.

In April, 1909, defendants were importers of Percheron horses, doing business at Wenona, Illinois, and plaintiff was a farmer and stock raiser at Betherville, Iowa. During that month plaintiff went to defendants' place at Wenona and purchased from them the stallion "Dardignan," which defendants had bought in France as a Percheron, they representing to plaintiff that the stallion was registered in the French stud book and also by the Percheron Society of America. With the animal plaintiff received from defendants a certificate of his pedigree issued by the Percheron Society of America and also what purported to be a certificate of his registration in France. The Iowa State Board of Agriculture refused to issue a license to stand the stallion for the season of 1912, on the ground that there were alterations and erasures in the pedigree certificate, and that the description of the stallion therein had been tampered with. It will be readily seen that the value of the animal for breeding purposes depended upon his pedigree as registered in the French stud book and the Percheron Society of America, and that, consequently, the authenticity of such registrations was of great importance to the owner of the animal. There is much testimony as to the difficulties encountered in this regard, but we think they are of but little moment in this controversy, because in settlement of such controversies the contract in suit was entered into. The contract, the material portions of which we recite, is dated March 13, 1912, and executed by plaintiff and defendants. It commences:

"Whereas, about April 10, 1909, George Hurley of Betherville, Iowa, purchased from Jos. Burgess & Son of Wenona, Illinois, through Thomas Burgess, a stallion whose name was Dardignan + registered by the Percheron Society of America, and whereas confusion exists as to

the description of registry and the identity of the said horse, and the said parties desire to adjust between themselves all liability for damages which may arise out of the sale, it is therefore agreed between said parties as follows:"

The contract then proceeds:

First, that said stallion is the sire of four colts, named "Dardanus", valued at $600; "Dardignan II", valued at $400; "Blanche", valued at $400; "Junette" valued at $350; all owned by George Murray; and further recites that the stallion was the sire of three other colts, viz., colt from Julia, value $250; colt from Lena, value $250; colt from Clematis, value $200; all owned by Murray. Other colts not owned by Murray and not material to this suit are also mentioned.

The contract further recites:

"And now, in view of the unsettled condition of the registry record of the said stallion, it is uncertain that the registry of said stallion will be continued, or that his colts are entitled to registry or will be permitted to be registered. Now in case the said progeny of said stallion shall be denied registry, the said Robt. Burgess & Son agree to purchase from said George Murray all of his above enumerated colts at the above agreed prices at the time of refusal of registry * and said Murray will make application for registry about June 1st, 1912, of all colts that have been foaled in the year 1911. * * *"

Said contract further provides that defendants will surrender to plaintiff his note for $1300, in favor of defendants, given for the stallion "Jumeuneuf," and that the contract shall stand as a bill of sale of said animal, the payment of which is acknowledged; that Murry will within a reasonable time bill and consign to defendants at Wenona said stallion, and that defendants will pay the freight and accept delivery at Estherville, Iowa; that "in settlement of all damages not enumerated above, and arising out of the purchase and sale of said stallion "Dardignan" sustained or that may be sustained by said Murray by reason

the description of registry and the identity of the said horse, and the said parties leave to subject between themselves all liability for damages which may arise out of the sale, it is therefore agreed between said parties as follows:"

The contract then proceeds:

"First, that said stallion is one of five colts, named "Darkness", valued at $600; "Dorthgen II", valued at $400; "Blanche", valued at $400; "Annette" valued at $350; all owned by George Murray; and further these that the stallion was the sire of three other colts, viz., colt from Zella, value $300; colt from Rose, value $250; colt from Olympia, value $300; all owned by Murray. Other colts not owner by Murray and not referred to this suit are also mentioned.

The contract further recites:

"And now, in view of the mentioned condition of the registry record of the said stallion, it is uncertain that the warranty of said stallion will be continued, or that his colts are entitled to registry or will be permitted to be registered. Now in case the said property of said stallion shall be denied registry, the said Rose, Dorthgen II and Olympia are to pass to ownership from said George Murray all of his above enumerated colts as the above agreed price at the time of ref. on of registry * and said Murray will make application for registry about June 1st, 1911, of all colts that have been foaled in the year 1911. * * *"

The contract further provides that defendants will surrender to plaintiff the note [illegible], an [illegible] of defendants, giving for the stallion "Darkness", [illegible] the contract shall also [illegible] the payment of [illegible] is accepted; [illegible] will [illegible] in a reasonable time [illegible] to [illegible] the at Vernons said stallion, and that defendants will pay the freight and [illegible] charges, now; that in [illegible] notice of all lawsuits not [illegible], [illegible] out of the purchase and sale of said stallion "Darkness" [illegible] or that may be [illegible] by said Murray [illegible]

of the defect in registry, expense, or any other cause, the said Robt. Burgess & Son have this day paid said Murray the sum of $350.00, the receipt of which is hereby acknowledged"; and concludes with an agreement on the part of plaintiff that he will not make or file any complaint with the Percheron Society of America or its officers regarding any confusion in the registry, etc., of said stallion, and that he will render all assistance in his means or power friendly or favorable to defendants in connection with all matters in the contract.

The damages awarded by the jury, $2650, and for which sum the court gave judgment, are those suffered by plaintiff by reason of the failure of defendants to perform the contract on their part for the purchase of the colts owned by plaintiff and in the contract mentioned.

The Percheron Society, on application made by plaintiff, refused registry of these colts, and at the same time revoked the registry of Dardignan's colts subsequent to April 10, 1909.

The colts were in apt time tendered by plaintiff to defendants, who refused to take them.

Among the errors assigned and urged in argument for reversal are, that the contract was unilateral, that it was a gambling contract, that the court erred in its rulings on the evidence and on the instructions to the jury, and that the verdict is contrary to the weight of the evidence.

The contract was entered into, as appears from its recitals, in settlement of disputes then existing between the parties, which settlement was a sufficient consideration to support the contract. The contract is not unilateral because both parties to it are charged with duties and obligations thereunder. It is a purchase and

of the defect in registry, expense, or any other cause, the said Robt. Burgess & Son have this day paid said Murray the sum of $350.00, the receipt of which is hereby acknowledged";

and concludes with an agreement on the part of plaintiff that he will not make or file any complaint with the Petroleum Society of America or its officers regarding any confusion in the registry, etc., of said addition, and that he will render all assistance in his means or power friendly or favorable to defendants in connection with all matters in the contract.

The damages awarded by the jury, $2550, and for which sum the court gave judgment, are those suffered by plaintiff by reason of the failure of defendants to perform the contract on their part for the purchase of the colts owned by plaintiff and in the contract mentioned.

The Petroleum Society, on application made by plaintiff, refused registry of these colts, and at the same time revoked the registry of Burdigham's colts subsequent to April 10, 1909.

The colts were in my time tendered by plaintiff to defendants, who refused to take them.

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The contract was entered into, as appears from its recitals, in settlement of disputes than existing between the parties, which settlement was a sufficient consideration to support the contract. The contract is not unilateral because both parties to it are charged with duties and obligations thereunder. It is a purchase and

sale contract made in settlement of disputes between the parties. The $350 payment by defendants to plaintiff was made pursuant to the contract. The stallion "Dardignan" was sent by plaintiff to defendants and received by them, as provided in the contract. Plaintiff's $1300 note, which defendants held for purchase price of the stallion "Jumeunneuf," was surrendered to plaintiff in accord with the stipulation of the contract in that regard. The parties by their conduct have established the bilateralness of the contract insofar as the same has been voluntarily performed by them. This is, we think, too patent to be of doubt.

In what respect the contract is a gambling contract we are unable to perceive. Some matters, which in the natural course of events might happen, are anticipated by the contract. The fact that such future happenings were anticipated can in no way be held to stigmatize the contract as a gambling contract.

There is no evidence in the record that plaintiff violated the contract by filing complaints with the Percheron Society of America or its officers, or that he did anything which caused the Society to refuse to register the colts. Neither can we say that plaintiff is liable in any way for the action of the Society in refusing registration, or for violation of its by-laws, if it did violate them. By the contract ~~of~~ the parties relied, as they necessarily must, upon the bona fides of the action of the Society in registering or refusing to register the colts. If any mala fides were proven against the Society in their refusal to register any of the colts, such conduct is not chargeable to plaintiff.

sale contract made in settlement of disputes between the parties. The $350 payment by defendants to plaintiff was made pursuant to the contract. The stallion "Berdigman" was sent by plaintiff to defendants and received by them, as provided in the contract. Plaintiff's $1200 note, which defendants held for purchase price of the stallion "Dameon-ent," was surrendered to plaintiff in accord with the stipulation of the contract in that regard. The parties by their conduct have established the bilateralness of the contract insofar as the same has been voluntarily performed by them. This is, we think, too patent to be of doubt.

In what respect the contract is a gambling contract we are unable to perceive. Some matters, which in the natural course of events might happen, are anticipated by the contract. The fact that such future happenings were anticipated can in no way be held to stigmatize the contract as a gambling contract.

There is no evidence in the record that plaintiff violated the contract by filing complaints with the Jefferson society of America or its officers, or that he did anything which caused the society to refuse to register the colts. Neither can we say that plaintiff is liable in any way for the action of the society in refusing registration, or for violation of its by-laws, if such did so true. By the contract as the parties relied, as they necessarily must, upon the some rules of the action of the society in registering or refusing to register the colts. If any such rules were broken against the society in refusing to register any of the colts, such conduct is not chargeable to plaintiff.

The verdict and judgment are supported by the proofs, and the measure of damages, whether erroneous or not, conforms to the measure of damages which defendants laid down in an instruction which they requested the court to give and which the court did give to the jury. In Brennen v. Chicago and Carterville Coal Co., 241 Ill.,610, it was held that a party will not be permitted on appeal to complain of an error in his opponent's instruction where his own instruction contains the same error. More than sixty instructions were proffered to the trial Judge by both sides - an unnecessary and inexcusable number. More than fifty of these instructions were proffered by defendants. If defendants' instructions had all been given, the jury would have been confused and not enlightened in applying to the evidential facts the multifarious propositions of law therein appearing. We are of the opinion that the instructions given by the learned trial Judge, culled, presumably, from this large number as best he could during the closing arguments of counsel in the case, sufficiently instructed the jury upon every proposition material and necessary to be applied to the facts before them. When a jury is sufficiently instructed on the law of the case, it is not error to refuse other instructions, even though they may state correct propositions of law which might be applied to the facts in proof.

There was no reversible error in procedure at the trial.

This appeal is without merit, and the judgment of the Circuit Court is affirmed.

AFFIRMED.

The verdict and judgment are supported by the proofs, and the measure of damages, whether erroneous or not, conforms to the measure of damages which defendants laid down in an instruction which they requested the court to give and which the court did give to the jury. In Brennan v. Chicago and Easterville Coal Co., 241 Ill.,610, it was held that a party will not be permitted on appeal to complain of an error in his opponent's instruction where his own instruction contains the same error. Here than sixty instructions were proffered to the trial judge by both sides - an unnecessary and inexcusable number. More than fifty of these instructions were proffered by defendants. If defendants' instructions had all been given, the jury would have been confused and not enlightened in applying to the evidential facts the multitudinous propositions of law therein appearing. We are of the opinion that the instructions given by the learned trial judge, unless, presumably, from this large number he had the could during the closing arguments of counsel in the case, sufficiently instructed the jury upon every proposition material and necessary to be applied to the facts before them. When a jury is sufficiently instructed on the law of the case, it is not error to refuse other instructions, even though they may state correct propositions of law which might be applied to the facts in evidence.

There was no reversible error in procedure at the trial.

This appeal is without merit, and the judgment of the Circuit Court is affirmed.

AFFIRMED.

315 - 22749.

204 I.A. 484

JAKE FALKIN, Appellee,	)	APPEAL,
vs.	)	MUNICIPAL COURT
SAMUEL KUNIN, Appellant.	)	OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for possession of certain premises in Chicago in a forcible detainer action. While the trial was by jury, the court instructed the verdict, upon which judgment was entered against defendant, and he appeals in an effort to reverse that judgment.

Defendant was a tenant of the store in question owned by Charlotte Kompel, who, by a lease dated July 1, 1916, demised the premises to the plaintiff, for a term of three years and two months. Defendant at the time of the making of this lease was in possession of the premises demised, and therefore had some negotiations with his lessor for an extension of his lease. Defendant paid rent for May, June and July, 1916. On the 20th day of June, 1916, Charlotte Kompel, the lessor, gave defendant a notice terminating the tenancy on July 31st thereafter and requiring him to surrender possession on that date. The defense is an agreement for another term. As stated by defendant and two of his witnesses, the lease was to be for a term of one, two or three years at a rental of $50 per month with a promise on the part of the lessor to make a written lease.

From the evidence it cannot be said that the minds of the parties met upon a new lease. The promise of a lease,

315 - 25749.

JAKE FALKIN, Appellee,	)	APPEAL.
vs.	)	MUNICIPAL COURT
SAMUEL KUBIK, Appellant.	)	OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for possession of certain premises in Chicago in a forcible detainer action. While the trial was by jury, the court instructed the verdict, upon which judgment was entered against defendant, and he appeals in an effort to reverse that judgment.

Defendant was a tenant of the store in question owned by Charlotte Kompel, who, by a lease dated July 1, 1916, demised the premises to the plaintiff, for a term of three years and two months. Defendant at the time of the making of this lease was in possession of the premises demised, and therefore had some negotiations with his lessor for an extension of his lease. Defendant paid rent for May, June and July, 1916. On the 20th day of June, 1916, Charlotte Kompel, the lessor, gave defendant a notice terminating the tenancy on July 31st thereafter and requiring him to surrender possession on that date. The defense is an agreement for another term. As evidenced by defendant and two of his witnesses, the lease was to be for a term of one, two or three years at a rental of $50 per month, with a promise on the part of the lessor to make a written lease.

From the evidence it cannot be said that the minds of the parties met upon a new lease. The promise of a lease,

if made, was broken, but the promise did not constitute a lease nor entitle defendant to hold over, and if he did hold over he became a tenant from month to month, requiring a thirty day notice to terminate his tenancy. This notice was given. The lessor, having by lease granted the right of possession to plaintiff, was the proper party to maintain the forcible detainer action. Gazzolo v. Chambers, 73 Ill. 75.

When the landlord had rightfully terminated the tenancy by notice, it was unnecessary to give any further notice as a sine que non to the right to commence an action for possession. Condon v. Brockway, 157 Ill. 90.

It is the law that where a tenant holds over for a year or for years after the term expires, without any new agreement, the landlord may at his election treat such tenant as a trespasser or as a tenant for another year upon the same terms as in the original lease. But no such right of election belongs to the tenant. Clinton Wire Cloth Co. v. Gardner, 99 ibid 151; Keegan v. Kinnare, 123 ibid 280. Under the statute, a demand for possession before bringing an action of forcible detainer against a tenant holding over is not necessary.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

if made, was broken, but the promise did not constitute a lease nor entitle defendant to hold over, and if he did hold over he became a tenant from month to month, requiring a thirty day notice to terminate his tenancy. This notice was given. The lessor, having by lease granted the right of possession to plaintiff, was the proper party to maintain the forcible detainer action. Gasnolo v. Chambers, 75 Ill. 78.

When the landlord had rightfully terminated the tenancy by notice, it was unnecessary to give any further notice as a sine qua non to the right to commence an action for possession. Gordon v. Wrightman, 187 Ill. 37.

It is the law that where a tenant holds over for a year or for years after the term expires, without any new agreement, the landlord may at his election treat such tenant as a trespasser or as a tenant for another year upon the same terms as in the original lease. The ... right of election belongs to the lessor. Illinois Life Ins. Co. v. Gardner, 99 Ill. App. 181; Kearns v. Chicago, 140 Ill. App. 360. Under the statute, a demand for possession before bringing an action of forcible detainer is not a term; holding over is not a tenancy.

The judgment of the trial court [illegible] affirmed.

[illegible].

325 - 22759

MARY SMECKPEPER,
Appellant,

vs.

CHICAGO RAILWAYS COMPANY, a corporation, and ERWIN C. HAGERMAN,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

204 I.A. 485

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is a personal injury action for the recovery of damages suffered by plaintiff when she was struck by an automobile owned by defendant Hagerman and at the time driven by his servant.

At the conclusion of the proofs of plaintiff the court, on the motion of defendants, instructed a verdict in favor of both defendants, upon which judgment was entered casting plaintiff in the costs of the cause, and she appeals, asking a reversal and a new trial.

The defendant, the Chicago Railways Company, pleaded specially that it was not the owner of the car which struck plaintiff. This was a denial of the averment in the declaration that the company owned the car, making it necessary for plaintiff, in order to succeed as to it, to prove the averred fact of the company's ownership. This she failed to do, so that the directed verdict as to the company was without error.

While we do not intend to express any opinion upon the weight or probative force of the evidence against the defendant Hagerman, still, uncontradicted, it was sufficient to support a verdict if the jury had found in plaintiff's favor. In other words, the case made by plaintiff's

325 - 52759

MARY SMOKERMAN,
Appellant,

vs.

CHICAGO RAILWAYS COMPANY, a corporation, and MARTIN C. HAGENMAN,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is a personal injury action for the recovery of damages suffered by plaintiff when she was struck by an automobile owned by defendant Hagenman and at the time driven by his servant.

At the conclusion of the proofs of plaintiff the court, on the motion of defendants, instructed a verdict in favor of both defendants, upon which judgment was entered casting plaintiff in the costs of the cause, and she appeals, asking a reversal and a new trial.

The defendant, the Chicago Railways Company, pleaded specially that it was not the owner of the car which struck plaintiff. This was a denial of the averment in the declaration that the company owned the car, making it necessary for plaintiff, in order to succeed as to it, to prove the averred fact of the company's ownership. This she failed to do, so that the directed verdict as to the company was without error.

While we do not intend to express any opinion upon the weight or probative force of the evidence against the defendant Hagenman, still, uncontradicted, it was sufficient to support a verdict if the jury had found in plaintiff's favor. In other words, the case made by plaintiff's

proofs constituted, uncontradicted, a prima facie case entitling her to a verdict and the assessment of some damages. Among other matters calling for determination by the jury, was the rate of speed at which the automobile was being driven when the accident happened, and also whether such speed was excessive, the place and environment considered, so that negligence, if the speed was excessive, was attributable to defendant Hagerman. It was decided in Mahlstedt v. Ideal Lighting Co., 271 Ill. 154, that in passing upon a motion for a directed verdict against a plaintiff, the court looks to the evidence most favorable to the plaintiff's claim; that the naked question raised for the court's consideration is whether there is any evidence fairly tending to support the plaintiff's cause of action, and that if there is, the jury must decide the case and not the court.

Should plaintiff so desire and move the court to do so, leave will be granted to amend the pleadings to conform to the present condition of the suit as to parties.

For the reasons above given the judgment of the Circuit Court as to the defendant Chicago Railways Company is affirmed, and as to the defendant Hagerman the judgment is reversed and the cause remanded for a new trial.

AFFIRMED AS TO CHICAGO RAILWAYS COMPANY AND REVERSED AND REMANDED FOR A NEW TRIAL AS TO HAGERMAN.

proofs constituted, uncontradicted, a prima facie case entitling her to a verdict and the assessment of some damages. Among other matters calling for determination by the jury, was the rate of speed at which the automobile was being driven when the accident happened, and also whether such speed was excessive, the place and environment considered, so that negligence, if the speed was excessive, was attributable to defendant Hagerman. It was decided in Mathiesen v. Ideal Laundry Co., 271 Ill. 154, that in passing upon a motion for a directed verdict against a plaintiff, the court looks to the evidence most favorable to the plaintiff's claim; that the naked question raised for the court's consideration is whether there is any evidence fairly tending to support the plaintiff's cause of action, and that if there is, the jury must decide the case and not the court.

Should plaintiff so desire and move the court to do so, leave will be granted to amend the pleadings to conform to the present condition of the suit as to parties.

For the reasons above given the judgment of the Circuit Court as to the defendant Chicago Railways Company is affirmed, and as to the defendant Hagerman the judgment is reversed and the cause remanded for a new trial.

AFFIRMED AS TO CHICAGO RAILWAYS COMPANY
AND REVERSED AND REMANDED FOR A NEW TRIAL
AS TO HAGERMAN.

472 - 22906

WILLIAM KRUG & SON CO.,
a corporation,
Appellee,

vs.

CHARLES JOHNSON et al.,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

204 I.A. 487

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Appellants have made motions regarding the transcript of the record in this cause, and we are asked to restore the record to its original condition when filed in the office of the clerk of this court.

Counsel for appellee has taken unwarranted and illegal liberties with the transcript. This he unblushingly admits. Such interference with and changing of a transcript of the record this court will not tolerate. The records are sacred. No one has any right to change such a transcript of the record without permission of the court first had and obtained.

The extent of the changing of the transcript is in dispute. That the transcript has been changed in many particulars is apparent, and many of such changes are admitted by counsel for appellee to have been made by him without the authority of this court. We cannot and will not go through this transcript and restore it to its original condition, as that would be imposing upon the court a task which it should not and will not assume. Such task if assumed could not, with the conflicting contentions of counsel before us, be accurately performed.

472 - 22906

WILLIAM KUHE & SON CO., a corporation, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
CHARLES JOHNSON et al., Appellants.	

MR. JUSTICE HORTON DELIVERED THE OPINION OF THE COURT.

Appellants have made motions regarding the transcript of the record in this cause, and we are asked to restore the record to its original condition when filed in the office of the clerk of this court.

Counsel for appellee has taken unwarranted and illegal liberties with the transcript. This he unblushingly admits. Such interference with and changing of a transcript of the record this court will not tolerate. The records are sacred. No one has any right to change such a transcript of the record without permission of the court first had and obtained.

The extent of the changing of the transcript is in dispute. That the transcript has been changed in many particulars is apparent, and many of such changes are admitted by counsel for appellee to have been made by him without the authority of this court. We cannot and will not go through this transcript and restore it to its original condition, a task that would be imposing upon the court a task which it should not and will not assume. Such task it assumed could not, with the conflicting contentions of counsel before us, be accurately performed.

The counsel who changed the transcript was guilty of a contempt of this court in so doing, for which we refrain, with much restraint, from disciplining him.

As we cannot from the transcript in its present condition know the truth of the record, and as appellee is chargeable with the difficulties confronting us in this regard, appellee will not be allowed to advantage of the judgment in its favor. By the action of counsel for appellee, the whole record is discredited. We will therefore relegate the parties to a retrial of the cause, after which the dissatisfied party may have a review, if he wishes, upon an unexpurgated record which imports verity.

For the reasons assigned, the judgment of the Municipal Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

The counsel who changed the transcript was guilty of a contempt of this court in so doing, for which we retrain, with much restraint, from disciplining him.

As we cannot from the transcript in its present condition know the truth of the record, and as appellee is chargeable with the difficulties confronting us in this regard, appellee will not be allowed to advantage of the judgment in its favor. By the action of counsel for appellee, the whole record is discredited. We will therefore relegate the parties to a retrial of the cause, after which the dissatisfied party may have a review, if he wishes, upon an unexpurgated record which imports verity.

For the reasons assigned, the judgment of the Municipal Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

439 - 21837

MAURICE RIORDAN, Appellee, vs. THOMPSON - STARRETT COMPANY, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

204 I.A. 488

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Maurice Riordan brought suit against the Thompson-Starrett Company to recover damages for personal injuries. There was a judgment in favor of the plaintiff for $4,000, to reverse which defendant prosecutes this appeal.

The defendant first contends that its motion in arrest of judgment should have been sustained, for the reason that the declaration does not state a cause of action. It is argued that the allegations of each of the counts of the declaration are but conclusions of law, and that no facts are averred which give rise to a duty owing from the defendant to the plaintiff. It will be unnecessary to analyze the three counts, for if one is found to be good, that is sufficient. Sec. 78, Chap. 110, R. S. The second count avers, inter alia, that the defendant was a building contractor and had a contract for the erection of a large office building; that the defendant was in charge and control of the building and had the right of access to all parts thereof; that it had entered into several contracts with sub-contractors; that the defendant and sub-contractors had employed a

MAURICE MORGAN, Appellee.	
vs.	ATTORNEY VICE
THOMPSON - STARRETT COMPANY, Appellant.	CERTIFICATE COURT,
	COOK COUNTY.

OPINION

MR. MODIFIED TRIAL JUDGE [illegible] delivered the opinion of the court.

Maurice Morgan brought suit against the Thompson-Starrett Company to recover damages for personal injuries. There was a judgment in favor of the plaintiff for $4,000, to reverse which defendant prosecutes this appeal.

The defendant first contends that at the action in arrest of judgment should have been sustained, for one reason that the complaint does not state a cause of action. It is argued that the allegations of such of the counts of the declaration as are sufficient to state a cause of [illegible] are insufficient to [illegible] the [illegible] arising from the statutes [illegible]. It is [illegible] unnecessary to analyze the [illegible] counts, or [illegible] found to be good, which is [illegible]. [illegible] Ill. R. 3. The general [illegible] v. [illegible], [illegible] the defendant was a building contractor [illegible] a structure for the erection of a large office [illegible]; that the defendant was in charge and control of the building and had the right of access to all parts of it; that it had entered into several contracts with subcontractors; that the defendant [illegible] subcontractors had employed a

large number of men in the prosecution of the work; that it was necessary that stairways and landings should be provided for the use of the employes of the defendant and sub-contractors in walking up and down between the different floors; that the defendant provided such stairways and landings; that one of the stairways was situated at a place where it was dark; that it was the duty of the defendant to see that there was sufficient light to enable the employes to pass up and down the stairways; that it was also the defendant's duty to provide and maintain a hand railing along the outer side of the stairways to prevent employes from falling off; that the defendant neglected to light one of the stairways and construct such hand railing; that plaintiff was employed by one of the sub-contractors and "that at the time and place aforesaid it became necessary and was proper for him, in the discharge of his duty as such employe of said sub-contractor, to use said stairway, or landing, in traveling between two of the floors of said building, and he alleges that while he was so using said stairway or landing," he fell off and was injured.

Complaint is made that no fact is averred in this count from which it appears that the defendant owed plaintiff any duty at the time plaintiff was injured; that the averment that "it became necessary and was proper for him, in the discharge of his duty as such employee of said sub-contractor, to use said stairway," is but a conclusion and not an averment of fact, and for aught that appears plaintiff may have been "merely wandering around the building pursuant to his own whim or pleasure or curiousity." The allegation that at the time of the accident plaintiff was necessarily using the stairway in the discharge of his

large number of men in the prosecution of the work; that it was necessary that stairways and landings should be provided for the use of the employes of the defendant and sub-contractors in walking up and down between the different floors; that the defendant provided such stairways and landings; that one of the stairways was situated at a place where it was dark; that it was the duty of the defendant to see that there was sufficient light to enable the employes to pass up and down the stairways; that it was also the defendant's duty to provide and maintain a hand railing along the outer side of the stairways to prevent employes from falling off; that the defendant neglected to light one of the stairways and construct such hand railing; that plaintiff was employed by one of the sub-contractors and "that at the time and place aforesaid it became necessary and was proper for him, in the discharge of his duty as such employe of said sub-contractor, to use said stairway, or landing, in travelling between two of the floors of said building, and he alleges that while he was so using said stairway or landing," he fell off and was injured.

Complaint is made of the fact to appear in this court from which it appears that the defendant, and plaintiff may, at the time plaintiff was injured; that the averment that "it became necessary and was proper for him, in the discharge of his duty as such employe of said sub-contractor, to use said stairway," is but a conclusion and not an averment of fact, and for aught that appears plaintiff may have been "merely wandering around the building present to his own whim or pleasure or idiosyncrasy." The allegation that at the time of the accident plaintiff was necessarily using the stairway in the discharge of his

duty as employe of the sub-contractor is not a conclusion, but a sufficient alegation of fact. The further allegation that the defendant undertook to provide and did provide stairways for the use of the men, and to see that they were properly lighted, but that it failed in this respect, does allege facts which give rise to a duty owing from the defendant to the plaintiff. And while the count may have been challenged by demurrer, yet as this was not done, the alegations are certainly sufficient on a motion in arrest of judgment. O'Rourke v. Sproul, 241 Ill. 576.

Furthermore, the defect, if any, in this regard is cured by verdict. In Paden v. C. R. I. & P. Ry. Co., 276 Ill. 63, the court said (p.65): "It has always been held that there are essentials to a recovery by the plaintiff which, though omitted from the averments of the declaration, will not render it insufficient to support a judgment. The rule stated in Chitty on Pleading (vol. 1, 673) and quoted in numerous decisions of this court is: "Where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict.'"

duty as employe of the sub-contractor is no conclusion, but a sufficient elucidation of fact. The further allegation that the defendant undertook to provide and did provide stairways for the use of the men, and to see that these were properly lighted, but that it failed in this respect, does allege facts which give rise to a duty owing from the defendant to the plaintiff. And while the court may have been mistaken in demurrer, it so this was not done, the allegations are certainly sufficient on a motion in arrest of judgment. Chisholm v. Kendall, 241 Ill. 376.

Furthermore, the defect, if any, in the pleading is cured by verdict. Gridley v. [illegible], 172 Ill. 63, in which it is said: "It has always been held that [illegible] by a judgment [illegible], cured [illegible] in the [illegible] verdict. [illegible] in Dalby v. [illegible], 172 Ill. [illegible] in numerous decisions of this court, as follows: "[illegible] are material, imperfections or omissions in any pleading, whether in substance or form, which would have been a valid objection upon demurrer, yet if the issue joined upon such as necessarily requires, on the whole pleading, a [illegible] so definitively or conclusively [illegible] that judgment would be in accordance to be presented thereby, [illegible] would insist the party to give up the jury [illegible] the verdict, such defect, imperfection or omission is cured by the verdict."

The defendant further contends that the court erred in overruling its motion made at the close of all the evidence to direct a verdict of not guilty, for the reason (1) that plaintiff was guilty of contributory negligence; (2) that he assumed the risk; (3) that as the building, stairway and railing were under course of construction, and undergoing constant change, the defendant owed no duty to the plaintiff to furnish him a safe place in which to do his work; (4) the stairway at the time of the accident was under the control of an independent contractor.

First: The defendant contends that the plaintiff was guilty of contributory negligence, and was therefore not entitled to recover, for the reason that he was perfectly familiar with the surroundings of the place where he was injured; that he had gone up and down the same stairway prior to the accident.

It appears from the evidence that the defendant was a general contractor and had the contract for constructing the Insurance Exchange Building, a large office building in Chicago, covering about one-half of a block; and was approximately twenty stories in height; that there were four stairways located near the four corners of the building, which the defendant provided for the men employed by it and the various sub-contractors to pass from floor to floor; that the building was under roof and nearly completed, the four permanent stairways being completed from the top down to the third floor; that the stairway where plaintiff was injured was located near the southeast corner of the building; that the defendant some time prior to the accident had constructed at this place a temporary stairway

The defendant further contends that the court erred in overruling its motion made at the close of all the evidence to direct a verdict of not guilty, for the reason (1) that plaintiff was guilty of contributory negligence; (2) that he assumed the risk; (3) that as the building, stairway and railing were under course of construction, and undergoing constant change, the defendant owed no duty to the plaintiff to furnish him a safe place in which to do his work; (4) the stairway at the time of the accident was under the control of an independent contractor.

First: The defendant contends that the plaintiff was guilty of contributory negligence, and was therefore not entitled to recover, for the reason that he was perfectly familiar with the surroundings of the place where he was injured; that he had gone up and down the same stairway prior to the accident.

It appears from the evidence that one Schenkent was a general contractor and had the contract for constructing the Insurance Exchange Building, a large office building in Chicago, covering about one-half of a block; and was approximately twenty stories in height; that there were four stairways located near the rear corners of the building, with the defendant furnished for the men employed by it and the various sub-contractors to pass from floor to floor; that the building was under roof and nearly completed, the four government buildings being completed from the top down to the third floor; that the stairway on the plaintiff was injured was located near the southeast corner of the building; that the defendant some time prior to the accident had constructed at this place a temporary stairway

to about the third floor which was for the use of the men in passing up and down; that the Flour City Iron Company had the contract for constructing the permanent stairways; that some time prior to the accident the temporary stairway where the accident occurred was removed by the defendant, and the Flour City Iron Company proceeded to construct the permanent stairway, and had substantially completed it, except the hand railing; that in going up this stairway, the plaintiff fell off and was injured.

The accident occurred in the evening when the stairway was dark. The evidence further tends to show that the Flour City Iron Company had constructed the stairway as above mentioned, and it was necessary for another sub-contractor to build a wall at the side of the stairway where plaintiff fell before the hand railing could be placed in position, and that in the meantime the stairway was being used by the employes of the defendant and the several sub-contractors in passing from floor to floor, several hundred men going up and down it daily; that the plaintiff had used the stairway twice the day previous to and once before on the day of the accident.

The defendant argues that as the plaintiff knew the condition of the stairway, and testified that just as he was going up the stairs prior to the accident, there was only a little light on the first floor; that some of the men coming down were striking matches so they could see; that this together with other evidence clearly shows that he was guilty of contributory negligence. In support of this contention the defendant cites the cases of E. St. Louis Ice and Cold Storage Co. v. Crow, 155 Ill. 74;

to about the third floor which was for the use of the men in passing up and down; that the Flour City Iron Company had the contract for constructing the permanent stairways; that some time prior to the accident the temporary stairway where the accident occurred was removed by the defendant, and the Flour City Iron Company proceeded to construct the permanent stairway, and had substantially completed it, except the hand railing; that in going up this stairway, the plaintiff fell off and was injured.

The accident occurred in the evening when the stairway was dark. The evidence further tends to show that the Flour City Iron Company had constructed the stairway as above described, and it was necessary for another sub-contractor to build a wall at the side of the stairway where plaintiff fell before the hand railing could be placed in position, and that in the meantime the stairway was being used by the employes of the defendant and the several sub-contractors in passing from floor to floor, several hundred men going up and down it daily; that the plaintiff had used the stairway twice the day previous to and once before on the day of the accident.

The defendant argues that as the plaintiff knew the condition of the stairway, and testifies that he had gone up the stairs prior to the accident, there was only a little light on the first floor; that some of the men coming down were stumbling around so they could see; that taken together with other evidence clearly shows that he was guilty of contributory negligence. In support of this contention the defendant cites the cases of Lewis vs. Chicago Stockyards Co., 2. N. Dakota, 119 111. Ya;

Browne v. Siegel-Cooper Co., 191 Ill. 226; De Vincenzo v. Chicago Railways Co., No. 21020, Appellate Ct., First Dist.; Piepho v. Merchants Loan & Trust Co., 168 Ill. App. 511.

In the Crow case plaintiff was injured by stepping into a large hole in the floor of a barge while unloading it. There the hole was clearly apparent, the plaintiff knew it was there and could see it.

In the Siegel-Cooper case, the deceased undertook to board an elevator for the purpose of going from one floor to another. The entrance to the elevator was dark and the door was open. The deceased stepped into the shaft, fell and was injured.

In the Piepho case, plaintiff was working for a sub-contractor in the reconstruction of a building. There was a hole in one of the floors into which the plaintiff fell. He had previously passed around the same, knew it was there, and it was plainly visible.

In each of these cases it clearly appears that if the injured person attempted to step into the hole or elevator shaft, injury would inevitably result, while in the case at bar the stairway could be safely used and had been used by hundreds of men without an accident.

In Devine v. Nat. Safe Deposit Co., 240 Ill. 369, the deceased, an employe, was unloading some merchandise onto a platform. There was an opening in the platform into which he fell and was killed. The accident occurred in the day time and the opening was in plain view. It was there contended that the court should have peremptorily

Brooks v. Stogel-Cooper Co., 191 Ill. 326; De Vincenzo v. Chicago Railways Co., No. 21020, Appellate Ct., First Dist.; Fleming v. Merchants Loan & Trust Co., 168 Ill. App. 311.

In the Brooks case plaintiff was injured by stepping into a large hole in the floor of a barge while unloading it. There the hole was clearly apparent, the plaintiff knew it was there and could see it.

In the Stogel-Cooper case, the deceased undertook to board an elevator for the purpose of going from one floor to another. The entrance to the elevator was dark and the door was open. The deceased stepped into the shaft, fell and was injured.

In the Fleming case, plaintiff was working for a sub-contractor in the reconstruction of a building. There was a hole in one of the floors into which the plaintiff fell. He had previously passed around the same, knew it was there, and it was plainly visible.

In each of these cases it clearly appears that if the injured person attempted to step into the hole or elevator shaft, injury would inevitably result, while in the case at bar the stairway could be safely used and had been used by hundreds of men without an accident.

In Devine v. Mut. Life Benefit Co., 240 Ill. 526, the deceased, an employe, was unloading some merchandise onto a platform. There was an opening in the platform into which he fell and was killed. The accident occurred in the day time and the opening was in plain view. It was there contended that the court should have peremptorily

instructed the jury to find for the defendant. The court in passing upon the contention said (p.374): "It cannot be said, as a matter of law, that Daly was not in the exercise of due care for his personal safety when he received the injuries, merely because he made use of the platform with full and complete knowledge of the danger." (citing cases.)

In the case at bar, whether plaintiff at and prior to the time of the injury was in the exercise of ordinary care for his own safety, was a question of fact for the jury. Ordinary care is defined in the instructions to be that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances. The evidence shows that several hundred men were daily using the stairway in question, and this evidence was competent, together with all the other facts and circumstances in the case to be considered by the jury in determining whether the plaintiff was in the exercise of ordinary care for his own safety at the time of the accident. Grand Trunk Ry. Co. v. Ives, 144 U.S. 409.

Second: Defendant argues that "plaintiff had knowledge of the danger or by the exercise of ordinary care would have had knowledge of the danger to which he was subjected in going up the stairway in the dark, there being no railing," and that "he assumed all risk incident to such danger, not as a matter of contract, but upon his knowledge of the existence of the danger and voluntarily exposing himself to it." It has been repeatedly held that the doctrine of assumed risk is only applicable to a case where the relationship of master and servant exists. Shoninger

instructed the jury to find for the defendant. The court in pausing upon the contention said (p.374): "It cannot be said, as a matter of law, that Daly was not in the exercise of due care for his personal safety when he received the injuries, merely because he made use of the platform with full and complete knowledge of the danger." (citing cases.)

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Second: Defendant argues that "plaintiff had knowledge of the danger or by the exercise of ordinary care would have had knowledge of the danger to which he was subjected in going up the stairway in the dark, there being no railing," and that "he assumed all risk incident to such danger, not as a matter of contract, but upon his knowledge of the existence of the danger and voluntarily exposing himself to it." It has been repeatedly held that the doctrine of assumed risk is only applicable to a case where the relationship of master and servant exists. Montgomery

v. Mann, 219 Ill. 242; Weifenbach v. White City Construction Co., No. 21407, Appellate Ct., First Dist. The defendant's argument is "merely an attempt to apply the doctrine of assumed risk and to give it another name." Devine v. Nat. Safe Deposit Co., supra.

Third: That the defendant owed no duty to maintain the stairway in a reasonably safe condition, for the reason that the stairway was in course of construction at the time, and that the rule requiring the defendant to furnish the plaintiff with a reasonably safe place to do his work does not apply, where the condition was changing from time to time in the prosecution of the work. The rule as contended for is undeubtedly well established, but has no application to the facts in this case. The evidence touching the question as to whether the stairway, at the time of the accident, had been completed, except as to the hand railing, is somewhat conflicting. A witness testified that work was being performed on the stairway at the time of the accident. Other witnesses testified that work had been completed three or four days prior to the accident. This question under proper instructions was left to the jury.

Fourth: That the stairway at and prior to the time of the accident was under the control of the Flour City Iron Company, and independent contractor, and therefore the defendant was not responsible for the injury sustained. On this proposition the jury were fully instructed that if the stairway at the time of the accident was under the control of the Flour City Iron Company, the defendant was not liable. The instruction was offered by the defendant and the jury by their verdict have determined the facts against it.

v. Mann, 210 III. 228; Wolfenbarger v. Illinois City Construction Co., No. 21407, Appellate Ct., First Dist. The defendant's argument is "merely an attempt to apply the doctrine of assumed risk and to give it another name." Darling v. Mut. Life Deposit Co., supra.

Third: That the defendant owed no duty to maintain the stairway in a reasonably safe condition, for the reason that the stairway was in course of construction at the time, and that the rule requiring the defendant to furnish the plaintiff with a reasonably safe place to do his work does not apply, where the construction was changing from time to time in the prosecution of the work. The rule as contended for is undoubtedly well established, but has no application to the facts in this case. The evidence tendering the question as to whether the stairway, at the time of the accident, had been completed, except as to the hand railing, is somewhat conflicting. A witness testified that work was being performed in the stairway at the time of the accident. Other witnesses testified that work had been completed three or four days prior to the accident. This question under proper instructions was left to the jury.

Fourth: That the stairway at the entrance to the time of the accident was under the control of the Illinois City Iron Company, and independent contractor, and therefore the defendant was not responsible for the injury sustained. On this proposition the jury were fully instructed that if the stairway at the time of the accident was under the control of the Illinois City Iron Company, the defendant was not liable. The instruction was of great advantage to the defendant and the jury by their verdict have determined the facts against it.

The defendant next contends that the evidence does not establish the cause of action charged in any count of the declaration, in that it is averred that prior to the accident, the defendant constructed and maintained the stairway in question, which it provided for the use of the men employed by it and the sub-contractors, and permitted the stairway to remain in an unsafe and dangerous condition, in failing to construct a hand railing. It is argued that these averments charged that the defendant erected the particular stairway in question without a railing for the use of the men, while the evidence establishes the fact that the defendant did not erect such stairway, but that it was erected by the Flour City Iron Company, and that this constitutes a variance. This point was not made in the trial court, and of course cannot be urged here. Furthermore we think the point is not well taken. It is alleged that the defendant provided the stairway in question for the use of the men, but that it was not properly guarded. The evidence tends to establish this averment, and is therefore sufficient to charge the defendant with liability, although the averment that the defendant had constructed the stairway was not sustained by the evidence.

The defendant further contends that the court erred in permitting the plaintiff to prove a custom tending to show that the general contractor and not the sub-contractor erected railings on temporary and permanent stairways which had been erected by subcontractors, and which were being used by the employes. Several witnesses testified to such custom, and it is argued that this custom in

The defendant next contends that the evidence does not establish the cause of action charged in any count of the declaration, in that it is averred that prior to the accident, the defendant constructed and maintained the stairway in question, which it provided for the use of the men employed by it and the sub-contractors, and permitted the stairway to remain in an unsafe and dangerous condition, in failing to construct a hand railing. It is argued that these averments charged that the defendant erected the particular stairway in question without a railing for the use of the men, while the evidence established the fact that the defendant did not erect such stairway, but that it was erected by the Sioux City Iron Company, and that this constituted a variance. This point was not made in the trial court, and of course cannot be urged here. Furthermore we think the point is not well taken. It is alleged that the defendant provided the stairway in question for the use of the men, but that it was not properly guarded. The evidence tends to establish this averment, and is therefore sufficient to charge the defendant with liability, although the averment that the defendant had constructed the stairway was not sustained by the evidence.

The defendant further contends that the court erred in permitting the plaintiff to prove a custom tending to show that the general contractor and not the sub-contractor erected railings on temporary stairways, which had been erected by subcontractors, and which were being used by the employes. Several witnesses testified to such custom, and it is argued that this custom in

so far as it related to temporary stairways had no bearing on the case, as the evidence showed that the temporary stairway constructed by the defendant had proper railings; that it was torn down prior to the accident, and therefore the temporary stairways had nothing to do with plaintiff's being injured; that this evidence was prejudidial, in that it eliminated the defense that the stairway at the time of the accident was in course of construction by an independent contractor who was engaged to build the stairway and railings; that no count of the declaration proceeds on such theory; that the defendant could not be held liable by reason of any custom, for the reason that it had a specific contract with the Flour City Iron Company to construct this stairway and railing. Whether this evidence was properly admitted is immaterial, for it clearly appears from the testimony of the defendant's general superintendent defendant's witness that in this particular case the stairway was turned over to the defendant by the Flour City Iron Company, after the latter company had completed its work, except as to the railing, and that it then became the duty of the defendant to properly safeguard such stairway. The question therefore was whether this stairway at the time of the accident which was being used by the employes of the defendant and the several sub-contractors had been turned over by the Flour City Iron Company to the defendant and was open for use by the men in passing from floor to floor. The jury were instructed fully on this proposition and found against the defendant, and we are clearly of the opinion that there was ample evidence to sustain their finding in this regard.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

so far as it related to temporary stairways had no bearing on the case, as the evidence showed that the temporary stairway constructed by the defendant had proper railings; that it was torn down prior to the accident, and therefore the temporary stairways had nothing to do with plaintiff's being injured; that this evidence was preliminary, in that it eliminated the defense that the stairway at the time of the accident was in course of construction by an independent contractor who was engaged to build the stairway and railings; that no count of the declaration proceeds on such theory; that the defendant could not be held liable by reason of any custom, for the reason that it had a specific contract with the Flour City Iron Company to construct this stairway and railing. Whether this evidence was properly admitted is immaterial, for it clearly appears from the testimony of the defendant's general superintendent defendant's witness that in this particular case the stairway was turned over to the defendant by the Flour City Iron Company, after the latter company had completed its work, except as to the railing, and that it then became the duty of the defendant to properly safeguard such stairway. The question therefore as whether this stairway at the time of the accident which was being used by the employes of the defendant and the several sub-contractors had been turned over by the Flour City Iron Company to the defendant and was open for use by the men in putting the [illegible] to fitness. The jury were instructed fully on this question [illegible] found against the defendant. [illegible] that there was ample evidence to sustain their finding in this regard.

The judgment of the superior court of Cook County is affirmed.

491 - 21889

EUGENIE J. CRISLER,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Eugenie J. Crisler brought suit against the Chicago City Railway Company to recover for personal injuries. From a judgment of $2,600 entered in favor of the plaintiff by the Superior Court of Cook County, defendant prosecutes this appeal.

Plaintiff was alighting from one of defendant's street cars and was injured, her contention being that the car stopped to permit passengers to alight, and while she was in the act of alighting, the car started with a jerk and threw her to the ground. The defendant's theory was that plaintiff got off the car before it had come to a stop. Plaintiff and her sister gave testimony tending to establish plaintiff's theory; while six witnesses gave testimony tending to establish the theory contended for by the defendant.

It is urged by the defendant with much force that the evidence offered on behalf of the plaintiff as to the manner in which the accident occurred is highly improbable. As, however, we have reached the conclusion that the judgment must be reversed because of errors in

401 - 21880

EUGENIE I. CHIRIAN,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM
MUNICIPAL COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Eugenie I. Chirian brought suit against the Chicago City Railway Company to recover for personal injuries. From a judgment of $2,000 entered in favor of the plaintiff by the Superior Court of Cook County, defendant prosecutes this appeal.

Plaintiff was alighting from one of defendant's street cars and was injured, her contention being that the car stopped to permit passengers to alight, and while she was in the act of alighting, the car started with a jerk and threw her to the ground. The defendant's theory was that plaintiff got off the car before it had come to a stop. Plaintiff and her sister gave testimony tending to establish the theory urged for by the defendant.

It is urged by the defendant with much force that the evidence offered on behalf of the plaintiff as to the manner in which the accident occurred is wholly improbable. We, however, do have reason to conclude that the judgment must be reversed because of errors in

instructions, we refrain from expressing any opinion as to the weight of the evidence, further than to say that in our opinion plaintiff's case is not so clear upon the facts that we would feel justified in holding that the errors in instructions were not prejudicial to the defendant.

At the request of the plaintiff the court gave instruction No. 10, which told the jury that the preponderance of evidence in a case is not alone determined by the number of witnesses testifying; that in determining upon which side the preponderance of evidence is, the jury should take into consideration various matters enumerated, omitting, however, any reference to the number of witnesses testifying pro and con, and concluded, "and from all these circumstances determine upon which side is the weight or preponderance of the evidence." This instruction has repeatedly been held misleading and erroneous, and especially so in a case such as the one at bar. Larson v. Ward-Corby Co., 198 Ill. App. 109; Chicago Union Traction Co. v. Hampe, 228 Ill. 350.

Plaintiff contends that even if this instruction is erroneous the error is cured by instruction 16 given on behalf of the defendant. If this instruction was the only one complained of, we would be inclined to hold that the error was not reversible, or in any event that under the rule announced in the cases of E. J. & E. Ry. Co. v. Lawlor, 229 Ill. 621; West Chicago Street R. R. Co. v. Lieserowitz, 197 Ill. 607, and Lyons v. Chicago City Ry. Co., 258 Ill. Ill. 95, the error was cured by instruction 16.

The court also, at the request of the plaintiff, gave instructions Nos. 6, 8, 9 and 11.

instructions, we refrain from expressing any opinion as to the weight of the evidence, further than to say that in our opinion plaintiff's case is not so clear upon the facts that we would feel justified in holding that the errors in instructions were not prejudicial to the defendant.

At the request of the plaintiff the court gave instruction No. 10, which told the jury that the preponderance of evidence in a case is not alone determined by the number of witnesses testifying; that in determining upon which side the preponderance of evidence is, the jury should take into consideration various matters enumerated, omitting, however, any reference to the number of witnesses testifying pro and con, and concluded, "and from all these circumstances determine upon which side is the weight or preponderance of the evidence." This instruction has repeatedly been held misleading and erroneous, and especially so in a case such as the one at bar. Larson v. Wood-Dorsey Co., 152 Ill. App. 102; Illinois Union Ins. Co. v. Kemp, 225 Ill. 320.

Plaintiff contends that even if this instruction is erroneous the error in our view by instruction 12 given on behalf of the defendant. If this instruction was the only one complained of, we could be inclined to hold that the error was not reversible, or at any event that under the rule announced in the cases of C. C. & C. Ry. Co. v. Lawler, 229 Ill. 491; West Chicago Street R. R. Co. v. Kinnevan, 197 Ill. 607, and Lyons v. Chicago City Ry. Co., 205 Ill. 111. 99, the error was cured by instruction 12.

The court also, at the request of the plaintiff, gave instructions No. 2, 3, 4, 5, 6, 7, 8, 9, 11,

Instruction No. 6 is as follows: "If the jury believe from the evidence in this case that car of the defendant company came to a stop at Wentworth avenue to let passengers alight; and if the jury further believe from the evidence in this case that Eugenie J. Crisler was a passenger on said car and while said car was at a standstill attempted with all due care and diligence to alight from said car; and if the jury further believe from the evidence in this case that while said Eugenie J. Crisler was in such act of alighting from said car said car was started by the servant of the company (if you believe said car was started), and that thereby Eugenie J. Crisler was injured in manner and form as charged in her declaration and that at the time of and just prior to said occurrence the said plaintiff was in the exercise of due and ordinary care and diligence for her own safety, then the jury should find the defendant guilty in the suit brought by Eugenie J. Crisler."

This instruction is not clear and would probably be confusing and misleading to the jury. It also attempts to enumerate facts which if proven would constitute negligence as a matter of law. It is always the better practice to have the jury determine whether the facts constitute negligence. City of Chicago v. Dinsmore, 162 Ill. 658.

Instruction No. 8 is argumentative and misleading. If it was desired that the jury be instructed as to the degree of care required of the defendant, this could be clearl stated so that it would be intelligible to the jury. This was the only instruction given on this subject, and the statement that the defendant was not an insurer of the safety of its passengers was in no way applicable to the facts, and might have tended to obscure the issue involved.

Instruction No. 6 is as follows: "If the jury believe from the evidence in this case that one of the defendant company came to a stop at Wentworth avenue to let passengers alight; and if the jury further believe from the evidence in this case that Eugenia J. Grisler was a passenger on said car, and while said car was at a standstill attempted with all due care and diligence to alight from said car; and if the jury further believe from the evidence in this case that while said Eugenia J. Grisler was in such act of alighting from said car said car was started by the servant of the company (if you believe said car was started), and that thereby Eugenia J. Grisler was injured in manner and form as charged in her declaration and that at the time of and just prior to said occurrence the said plaintiff was in the exercise of due and ordinary care and diligence for her own safety, then the jury should find the defendant guilty in the suit brought by Eugenia J. Grisler."

This instruction is not clear and would probably be confusing and misleading to the jury. It also attempts to enumerate facts which in never could constitute negligence as a matter of law. It is always the better practice to have the jury determine whether certain conditions constitute negligence. <u>City of Chicago v. Langendorf</u>, 148 Ill. 372.

Instruction No. 8 is argumentative and misleading. It is not material that the jury be instructed as to the degree of care required of the defendant, this could be clearly stated so that it would be intelligible to the jury. This was the only instruction given to the subject, so the statement that the defendant was not an insurer of the safety of its passengers was in no way qualified to the jury, and might have tended to obscure the issue involved.

By instruction No. 9 the jury were told that plaintiff was only required to make out her case by a preponderance of the evidence, and that any evidence, circumstantial or positive and direct, which tended to produce belief in the mind of the jury was proper to be considered by them in determining whether the defendant was guilty. This instruction, under the facts of this case, would be of no assistance to the jury in reaching a solution as to whether plaintiff was given sufficient time after the car had stopped to alight therefrom, or whether she attempted to alight from the car before it had stopped, which was the only questions involved. Its only effect would be to confuse the jury.

Instruction No. 11 attempted to define what elements could be considered in determining plaintiff's damages. Plaintiff concedes that this instruction is inartistically and inartificially drawn. This defect can be cured on another trial.

In People v. Csontos, 275 Ill. 407, the court said: (p.407) "The utility of instructions to juries is to advise them concerning the rules of law applicable to the facts of each case, and their efficiency depends upon the ability of the jury to make such application." We think the instructions above discussed would not be of assistance to the jury in this case, but on the contrary would tend to confuse and mislead them, and where the right to recover is doubtful, it is essential that instructions correctly state the law. Strawboard Co. v. C. & A. R. R. Co., 177 Ill. 513.

By instruction No. 2 the jury were told that plaintiff was only required to make out her case by a preponderance of the evidence, and that any evidence, circumstantial or positive and direct, which tended to produce belief in the mind of the jury was proper to be considered by them in determining whether the defendant was guilty. This instruction, under the facts of this case, would be of no assistance to the jury in reaching a solution as to whether plaintiff was given sufficient time after the car had stopped to alight therefrom, or whether she attempted to alight from the car before it had stopped, which was the only questions involved. Its only effect would be to confuse the jury.

Instruction No. 11 attempted to define what elements could be considered in determining plaintiff's damages. Plaintiff conceded that this instruction is inartistically and inaccurately drawn. This defect can be cured on another trial.

In People v. Gaughan, 279 Ill. 407, the court said: (p.407) "The utility of instructions to juries is to advise them concerning the rules of law applicable to the facts of each case, and their efficacy depends upon the ability of the jury to make such application." We think the instructions above discussed could not be so misconstrued to the jury in this case, but on the contrary could tend to confuse and mislead them, and where the right to recover is doubtful, it is essential that instructions correctly state the law. Kirkpatrick Co. v. C. R. A. R. R. Co., 177 Ill. 318.

Plaintiff, however, contends that even if the instructions were erroneous, the errors were cured by other instructions given on behalf of the defendant. We, however, are of the opinion that in view of the closeness of the case, the errors in the instructions were not cured, and the judgment of the Superior Court must be reversed and the cause remanded.

REVERSED AND REMANDED.

Plaintiff, however, contends that even if the instructions were erroneous, the errors were cured by other instructions given on behalf of the defendant. We, however, are of the opinion that in view of the closeness of the case, the errors in the instructions were not cured, and the judgment of the Superior Court must be reversed and the cause remanded.

REVERSED AND REMANDED.

23044

PEOPLE OF THE STATE OF ILLINOIS, By Rufus M. Potts, etc., Appellee, vs. CONTINENTAL BENEFICIAL ASSOCIATION, et al., Appellants.	INTERLOCUTORY APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

After the order was entered awarding a writ of injunction and appointing a receiver in People v. Continental Beneficial Association, et al., Gen. No. 23043, opinion filed this date, appellants filed a bill in the Circuit Court of Cook County, touching the same matters involved in that case, and asking for the appointment of an ancillary receiver of the property of appellant association. Thereupon the receiver filed a petition in the suit pending in the Superior Court praying that appellants be enjoined from prosecuting the suit in the Circuit Court, and an order was entered in accordance with the prayer of the petition, to reverse which this appeal is prosecuted.

The only ground urged for reversal of the order is that the Superior Court had no authority to appoint a receiver. As we have this day held that the appointment of the receiver by the Superior Court was proper (People v. Continental Beneficial Association, et al., supra.) that case is controlling.

The order of the Superior Court appealed from will, therefore, be affirmed.

Mr. Justice Taylor dissents. AFFIRMED.

PEOPLE OF THE STATE OF ILLINOIS, By Hurlus K. Potts, etc., Appellee,	
vs.	INTERLOCUTORY APPEAL FROM SUPERIOR COURT, COOK COUNTY.
CONTINENTAL BENEFICIAL ASSOCIATION, et al., Appellants.	

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

After the order was entered awarding a writ of injunction and appointing a receiver in People v. Continental Beneficial Association, et al., Gen. No. 25023, opinion filed this date, appellants filed a bill in the Circuit Court of Cook County, involving the same matters involved in that case, and asking for the appointment of an auxiliary receiver of the property of appellant association. Thereupon the receiver filed a petition in the suit pending in the Superior Court praying that appellants be enjoined from prosecuting the suit in the Circuit Court, and an order was entered in accordance with the prayer of the petition, to reverse which this appeal is prosecuted.

The only ground urged for reversal of the order is that the Superior Court had no authority to enjoin a receiver. As we have this day held that the appointment of the receiver by the Superior Court was proper (People v. Continental Beneficial Association, et al., supra.) that case is controlling.

The order of the Superior Court appealed from will, therefore, be affirmed.

Justice Taylor dissents.

399 - 21797

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. James O'Brien, Defendant in Error, vs. CITY OF CHICAGO, HARMON M. CAMPBELL, ELTON LOWER and JOHN J. FLYNN, Civil Service Commissioners of the City of Chicago, THOMAS O'CONNOR, Fire Marshal, and MICHAEL ZIMMER, Comptroller of the City of Chicago, Plaintiffs in Error	ERROR TO CIRCUIT COURT, COOK COUNTY.

204 I.A. 516

MR. JUSTICE GOODWIN delivered the opinion of the court.

This writ of error was sued out to reverse a judgment entered in the Circuit Court, directing the issuance of a writ of mandamus commanding the respondents to place the name of relator on the roster of pipemen of the Fire Department of the City of Chicago. An abstract of record was filed January 18, 1916, and when the cause was called January 26, 1916, it was taken on abstract filed and brief to be filed by the plaintiffs in error by February 25, 1916. Plaintiffs in error have, however, failed to file their brief. Rule 22 of this court provides that:

> "In case of the failure of the plaintiff in error or appellant to file both his abstract and brief within the time limited herein, the appeal or writ of error will be dismissed on motion and notice before, or without notice on the call of the docket, unless the delay is excused upon circumstances to be shown by affidavit."

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. James O'Brien, Defendant in Error, vs. CITY OF CHICAGO, HARRON M. GARFIELD, ELTON LOVER and JOHN J. KIRKN, Civil Service Commissioners of the City of Chicago, THOMAS C. GORMON, Fire Marshal, and MICHAEL ZIMMER, Comptroller of the City of Chicago, Plaintiffs in Error.	ERROR TO CIRCUIT COURT, COOK COUNTY.

SYLLABUS

MR. JUSTICE GOODWIN delivered the opinion of the court.

This writ of error was sued out to reverse a judgment entered in the Circuit Court, directing the issuance of a writ of mandamus commanding the respondents to place the name of relator on the roster of plumbers of the Fire Department of the City of Chicago. An abstract of record was filed January 18, 1916, and when the cause was called January 20, 1916, it was taken on abstract filed and brief to be filed by the plaintiffs in error by February 28, 1916. Plaintiffs in error have, however, failed to file their brief. Rule 20 of this court provides that:

> "In case of the failure of the plaintiff in error or appellant to file both his abstract and brief within the time limited herein, the appeal or suit of error will be dismissed on motion and notice before, or without notice on the call of the docket, unless the delay is excused upon showing shown to be shown by affidavit."

The cause has been taken and is now reached in its regular order, and in view of the failure of plaintiffs in error to comply with the rule above quoted, the writ of error must be dismissed. This is obviously not affected by the fact that the defendant in error has failed to file an appearance, since he is not required to file an appearance by any given day, nor is he required to file a brief until briefs have been filed by plaintiffs in error.

The writ of error will, therefore, be dismissed.

WRIT DISMISSED.

The cause has been taken and is now reached in its regular order, and in view of the failure of plaintiffs in error to comply with the rule above quoted, the writ of error must be dismissed. This is obviously not affected by the fact that the defendant in error has failed to file an appearance, since he is not required to file an appearance by any given day, nor is he required to file a brief until briefs have been filed by plaintiffs in error.

The writ of error will, therefore, be dismissed.

WRIT DISMISSED.

409 - 21807.

LOUIS W. HILL and WATSON P. DAVIDSON, Defendants in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT OF CHICAGO.
NATHAN ARONSON, Plaintiff in Error.	)	

MR. JUSTICE GOODWIN delivered the opinion of the court.

Plaintiff in error seeks to reverse an order of the Municipal Court overruling his motion to vacate a judgment rendered by confession against him for $550.00 under a cognovit contained in a lease. The statement of claim recites that it is for rent accrued under a lease executed by plaintiff's assignor, whereby defendant undertook to pay $500.00 as rent for the month of June, A. D. 1915, for certain premises therein described. The lease contained the following stipulation:

> "It is understood that the said lessor shall not lease any portion of the building in which the above premises are located to any one for the purpose of retailing liquors or carrying on a saloon or buffet business."

Plaintiff in error presented his affidavit, in which he set out, among other things, the clause just quoted, and stated that in violation of this agreement, the lessor or his assignees had, about November 1, 1914, demised a portion of the second floor of said premises to certain parties for the purpose of retailing liquors and carrying on a general saloon or buffet business; that the parties were operating the same under a license issued by the City of Chicago, and were soliciting liquor and saloon business from the tenants of the building and from the public generally, and that consequently it was no longer possible for his sub-tenant to continue the saloon business, and he therefore surrendered possession April 30, 1915. He also presented an affidavit of his sub-tenant to the same effect.

409 - RIGHT.

LOUIS W. BILL and NATHAN P. SAVAGSON,
Defendants in Error,

vs.

NATHAN ABRAMSON,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

20 I.A. 317

MR. JUSTICE SCOTT delivered the opinion of the court.

Plaintiff in error seeks to reverse an order of the Municipal Court overruling his motion to vacate a judgment rendered by confession against him for $600.00 under a warrant contained in a lease. The statement of claim recites that it is for rent accrued under a lease executed by plaintiff's assignor, whereby defendant undertook to pay $600.00 an year for the month of June, A. D. 1918, for certain premises therein described. The lease contained the following stipulation:

> "It is understood that the said lessee shall not lease any portion of the building in which the above premises are located to any one for the purpose of retailing liquors or carrying on a sale on a buffet business."

Plaintiff in error presented his affidavit, in which he set out, among other things, the clause just quoted, and stated that in violation of this covenant, the lessee on his assignee was, about [illegible] 1918, [illegible] a portion of the rooms floor of said premises to [illegible] partition for the purpose of retailing liquors and carrying on a general saloon or buffet business, and [illegible] operating the same under a license issued by [illegible] Illinois, and were retailing liquor and selling [illegible] thereto of the building and [illegible] consequently it was no longer responsible [illegible] continue the saloon business, and he [illegible] possession April 30, 1919. He [illegible] of his sub-tenant to the same effect.

The defendants in error, who recovered under the terms of the lease, did so by virtue of the fact that they stood in the shoes of their assignor, and they are, therefore, of necessity bound by all the terms of the lease in the same manner in which he was bound. The question fairly presented to this court is as to whether the violation of the clause in the lease against leasing any other portion of the building for saloon or buffet purposes, on November 1, 1914, and the continued violation for a period of six months, was sufficient to justify plaintiff in error in rescinding the lease. The value of the premises to the lessee for the purpose for which they were leased obviously depended in a large measure upon the observance by the lessor of the stipulation against any leasing of any portion of the building to any other party for the purpose of retailing liquors or carrying on a saloon or buffet business. In view of that fact the case of University Club v. Deakin, 265 Ill. 257 is controlling. There, the court held that the violation of a clause in a lease which provided that "lessor hereby agrees during the term of this lease not to rent any other store in said University Club building to any tenant making a specialty of the sale of Japanese or Chinese goods or pearls," entitled the lessee to terminate the lease. The court said, page 260:

> "It was concerning a matter in reference to which the parties had a perfect right to contract, and it will be presumed that plaintiff in error would not have entered into the contract if this clause had not been made a part of it."

There is nothing in the argument presented by counsel for defendants in error that the clause recites that "it is understood," instead of "it is agreed."

As the matter set up in the affidavit, if true, constituted a defense to the action, it was the duty of the trial court to open up the judgment and permit the plaintiff

The defendants in error, who recovered under the terms of the lease, did so by virtue of the fact that they stood in the shoes of their assignor, and they are, therefore, of necessity bound by all the terms of the lease in the same manner in which he was bound. The question fairly presented to this court is as to whether the violation of the clause in the lease against leasing any other portion of the building for saloon or buffet purposes, on November 1, 1924, and the continued violation for a period of six months, was sufficient to justify plaintiff in error in rescinding the lease. The value of the premises to the lessee for the purpose for which they were leased obviously depended in a large measure upon the observance by the lessor of the stipulation against any leasing of any portion of the building to any other party for the purpose of maintaining liquors or operating a saloon or buffet business. In view of that fact the case of Kinsmanity Club v. Doelle, 300 Ill. 447 is controlling. There, the court held that the violation of a clause in a lease which provided that "liquor hereby agreed during the term of this lease not to work any other house in said University Club building to be used as a place of the sale of liquors or things, and or permit," entitled the lessee to terminate the lease. The court said, page 450:

> "It was a covenant of material importance to which the portion [illegible] complained of, and it will be presumed that plaintiff in error would not have entered into the lease [illegible] clause had not been made a part of it."

There is nothing in the argument presented by counsel for defendants in error that [illegible] "it is misunderstood," instead of "it is [illegible]."

As the matter [illegible] constituted [illegible] trial court [illegible]

in error to file an affidavit of merits and plead to defendants in errors' cause of action. The order of the Municipal Court denying this motion is, therefore, reversed, and the cause will be remanded to that court for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

in error to file an affidavit of merits and plead to defendants in errors' cause of action. The order of the Municipal Court denying this motion is, therefore, reversed, and the cause will be remanded to that court for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

201 - 21595

2744

BICKETT COAL AND COKE COMPANY,
a corporation,

Plaintiff in Error,

vs.

JOHN W. KEOGH & COMPANY,
a corporation,

Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

204 I.A. 527

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is a suit of the 4th class, brought in the Municipal Court by Bickett Coal & Coke Company, plaintiff in error (hereinafter designated plaintiff) against John W. Keogh & Company, defendant in error, (hereinafter designated defendant) for a balance of $260.22, claimed to be due as part of the selling price of ten carloads of coal shipped to the defendant; five cars being sent to the defendant's factory at Soldiers' Grove, Wisconsin, and five cars being sent to the defendant's factory at East Dubuque, Illinois, in the Summer of 1912.

The plaintiff filed a statement of claim for coal furnished at the request of the defendant, and upon an account stated. The defendant filed an affidavit of merits, denying the account stated, and stating that the defendant objected tothe quality of the coal; that it refused to pay therefor; that it requested the removal of the coal and that the coal furnished was not "Lincoln Nut" as ordered, but was coal of an inferior quality.

204 - 21555

MIDWEST COAL AND COKE COMPANY, a corporation, Plaintiff in Error,	ERROR TO
vs.	MUNICIPAL COURT
JOHN W. KEOGH & COMPANY, a corporation, Defendant in Error.	OF CHICAGO.

204 I.A. 527

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is a suit of the 4th class, brought in the Municipal Court by Midwest Coal & Coke Company, plaintiff in error (hereinafter designated plaintiff) against John W. Keogh & Company, defendant in error, (hereinafter designated defendant) for a balance of $200.22, claimed to be due as part of the selling price of six carloads of coal shipped to the defendant; five cars being sent to the defendant's factory at Soldiers' Grove, Wisconsin, and five cars being sent to the defendant's factory at East Dubuque, Illinois, in the Summer of 1912.

The plaintiff filed a statement of claim for coal furnished at the request of the defendant, and upon an account stated. The defendant filed an affidavit of merits, denying the account stated, and stating that the defendant objected to the quality of the coal; that it refused to pay therefor; that it requested the review I of the coal and that the coal furnished was not "Fine to Wit" as [illegible], but was coal of an inferior quality.

The defendant also filed a statement of claim of set-off, alleging that the defendant's claim is for money paid to the plaintiff for coal and freight; that the coal shipped was not of the quality ordered and was wholly unfit for use; that he was obliged to pay the freight before he could get the coal; that immediately thereon he paid to the plaintiff the purchase price of said coal; that at that time it, the defendant, did not know and had no means of finding out that the coal was of an inferior grade and not as ordered, and unfit for use; that immediately upon finding that out, it, the defendant, notified the plaintiff that it would not accept the coal and requested the plaintiff to remove it; that the amount of money due to the defendant from the plaintiff for said coal and freight thereon, and for freight on the coal mentioned in plaintiff's statement of claim, and for having said cars of coal unloaded, is $985.50.

The plaintiff filed an affidavit of merits to the defendant's statement of set-off, alleging that the freight charges are part of the purchase price of the coal and that all of the coal was of the same quality as represented to the defendant at the time the order was taken.

In the year 1912, the plaintiff was in the business of selling coal in carload lots, and the defendant, in July, August and September, of that year, was engaged in the manufacture of excelsior, etc., and had two factories, one at Soldiers' Grove, Wisconsin, and one at East Dubuque, Illinois.

On July 10, 1912, the defendant bought two carloads of Franklin coal. Prior to that time the defendant had used,

The defendant also filed a statement of claim of set-off, alleging that the defendant's claim is for money paid to the plaintiff for coal and freight; that the coal shipped was not of the quality ordered and was wholly unfit for use; that he was obliged to pay the freight before he could get the coal; that immediately thereon he paid to the plaintiff the purchase price of said coal; that at that time it, the defendant, did not know and had no means of finding out that the coal was of an inferior grade and not as ordered, and unfit for use; that immediately upon finding that out, it, the defendant, notified the plaintiff that it would not accept the coal and requested the plaintiff to remove it; that the amount of money due to the defendant from the plaintiff for said coal and freight thereon, and for freight on the coal mentioned in plaintiff's statement of claim, and for paying said cars of coal unloaded, is $[illegible].50.

The plaintiff filed a reply to the defendant's statement of set-off, alleging that the freight charges are part of the purchase price of the coal and that all of the coal was of the same quality as represented to the defendant at the time the order was taken.

In the year 1912, the plaintiff was in the business of selling coal in England to the defendant, in July, August and September, of that year, the company in the manufacture of excelsior, etc., [illegible] two factories, one at Children' Grove, Wisconsin, and [illegible] Lake Superior, Michigan.

On July 19, 1912, the defendant bought two carloads of Franklin coal. Prior to that time the defendant had been

with the exception of a small amount of coal bought from a local dealer at Soldiers' Grove, wood fuel, exclusively, at Soldiers' Grove. In the month of August, 1912, one Cone, representing the plaintiff, went to the office of the defendant, in Chicago, in an effort to sell coal to the defendant. Keogh, representing the defendant, and Cone, representing the plaintiff, talked over the subject of buying and selling coal for the plants mentioned. There is considerable conflict as to what was said at that time. Keogh testified that he told Cone that he had formerly had some inferior coal which "ran" and caused the grates to burn out; that they had used a line of coal at East Dubuque from the Burton & Ziegler District; that Cone said he could ship the defendant just as good coal; that he Keogh, then discussed what the defendant wanted in the way of coal; that it wanted coal which would be at a lower freight rate than from Franklin County; that Cone said, "I know just what you want. I will figure it out and let you know what we can do;" that Cone went back to his office and sent the defendant a proposition, naming prices for Franklin County coal, Lincoln Nut coal, and also some Springfield coal; that Keogh told Cone that the defendant had tried Springfield coal; that they could not use it; that then Cone revised his prices, both on the Franklin County coal and on the Lincoln County coal. The written proposition was as follows:

Lincoln roller screened 1 1/2 x 7/8" clean raw nut coal, Illinois Central delivery, E. Dubuque,	$2.55	$2.30
C. M. & St. P. delivery, Soldiers'Grove.	2.97	2.90
Same size nut, but shipment to be made from the Springfield district, good clean coal, 10¢ per ton less at that point.		

with the exception of a small amount of coal bought from a local dealer at Soldiers' Grove, wood fuel, exclusively, at Soldiers' Grove. In the month of August, 1912, one Cone, representing the plaintiff, went to the office of the defendant, in Chicago, in an effort to sell coal to the defendant. Keogh, representing the defendant, and Cone, representing the plaintiff, talked over the subject of buying and selling coal for the plants mentioned. There is considerable conflict as to what was said at that time. Keogh testified that he told Cone that he had formerly had some inferior coal which "ran" and demand the greater to burn out; that they had used a line of coal at West Dubuque for the Burton & Kiegler District; that Cone said he could ship the defendant just as good coal; that he Keogh, then discussed what the defendant wanted in the way of coal; that it wanted coal which would be at a lower freight rate than from Franklin County; that Cone said, "I know just what you want. I will figure it out and let you know what we can do;" that Cone went back to his office and sent the defendant a proposition, naming prices for Franklin County coal, Lincoln Nut coal, and also some Springfield coal; that Keogh told Cone that the defendant had tried Springfield coal; that they could not use it; that then Cone revised his prices, both on the Franklin County coal and on the Lincoln County coal. The written proposition was as follows:

Lincoln rolled screenings 1 1/2 x 3/4" lump
raw nut coal, Illinois Central delivery,
W. Dubuque, [illegible]
C. R. & M. R. delivery, Soldiers Grove. [illegible]
Some also nut, but thinking it to be made
from the Springfield district, good clean
coal, 10% per ton less at that point.

#2 or #3 washed coal, from Virden, Illinois, I.C. or C.B. & Q. delivery, E. Dubuque,	2.56
C.M. & St. P. delivery, Soldiers' Grove	3.17

Keogh further testified that he asked Cone if the plaintiff could not give the defendant coal from a nearer mine that would be just as good coal; that Cone said "he knew just what we wanted." "I was to leave it to him and he would see that we got the proper thing;" that Cone stated that "the quality of the coal would be as good as the Franklin County coal which we had, and which would be satisfactory." As a result of the negotiations between Keogh and Cone, five cars of 1 1/2 x 7/8" Nut, at $2.90, were ordered on August 31, 1912, tobe shipped to Soldiers' Grove, and on August 30, 1912, five cars 1 1/2 x 7/8" Lincoln Nut, at $2.30, to be shipped to East Dubuque. Accordingly the ten tons of coal were shipped between August 31, 1913, and September 21, 1913. Some of the coal arrived in September; and all of it probably before October 8, 1913.

On October 5th, the defendant complained that the "Nut" coal which had been shipped to Soldiers' Grove and East Dubuque had not proven satisfactory. Keogh testified that he telephoned Cone that he had a letter from Soldiers' Grove, stating that the coal seemed to be full of glass; that it melted and clogged the grates with clinkers; that it was useless for their purpose; that he got a sample of the coal sent to Chicago, by express, and about a week afterwards gave Cone a sample; that subsequently he showed Cone a sample of the coal, and Cone said "if I had known how you were fixed up there at Soldiers' Grove, I would never have sent you the coal;"that he then asked Cone for shipping directions, meaning to where shall I send it, and that Cone said "I don't know where to send it." The defendant was in the habit of

½ or ½ washed coal, from Virden, Litchfield, I.C. or C.B. & Q. delivery, W. Dubuque,	2.50
C.M. & St. P. delivery, Soldiers' Grove	3.17

Keogh further testified that he asked Cone if the plaintiff could not give the defendant coal from a nearer mine that would be just as good coal; that Cone said "he knew just what we wanted." "I was to leave it to him and he would see that we got the proper thing;" that Cone stated that "the quality of the coal would be as good as the Franklin County coal which we had, and which would be satisfactory." As a result of the negotiations between Keogh and Cone, five cars of 1 1/2 x 7/8" Nut, at $2.50, were ordered on August 21, 1912, to be shipped to Soldiers' Grove, and on August 26, 1912, five cars 1 1/2 x 7/8" Lump Nut, at $2.50, to be shipped to West Dubuque. Accordingly the ten tons of coal were shipped between August 21, 1912, and September 21, 1912. None of the coal arrived in September; and all of it promptly before October 3, 1912.

On October 5th, the defendant complained that the "Nut" coal which had been shipped to Soldiers' Grove and West Dubuque had not proven satisfactory. Keogh testified that he telephoned Cone that he had a letter from Soldiers' Grove, stating that the coal seemed to be full of slate; that it melted and clogged the grates with clinkers; that it was useless for their purpose; that he got a sample of the coal sent to Chicago, by express, and also a week afterwards gave Cone a sample; that subsequently he gave Cone a sample of the coal, and Cone said "if I had known how you were fixed up there at Soldiers' Grove, I would never have sent you the coal;" that he then asked Cone for shipping directions, meaning to where shall I send it, and that Cone said "I don't know where to send it." The defendant saw in the light of

using sawdust and the ends of logs of wood and excelsior with the coal. Keogh testified further that he told Cone the coal might be good for a plant which had a large surplus of grate surface, and also that when the defendant bought the first two cars from Cone, meaning the Franklin County coal, he, Cone, was told about the plants and that they used wood as a fuel, together with the coal. On November 29, 1912, the defendant wrote the plaintiff, asking for shipping directions "so that we may get rid of the objectionable fuel;" also on May 29, 1913, the defendant notified the plaintiff that the coal was still on the ground at Soldiers' Grove and East Dubuque, subject to the plaintiff's order.

The defendant's witnesses, Stevenson and Stantorf, who were fireman and foreman, respectively, for the defendant, at Soldiers' Grove, in the Summer and Fall of 1912, both testified that the first two cars of coal, meaning the Franklin coal, was satisfactory, but that the five cars, referring to the Nut coal, clinkered and ran. Stevenson testified, "It would run like tar, and it would fill the grates up," etc. "After I tried to burn it two or three weeks I quit entirely," and Stantorf testified, "it appeared to be soft and the clinkers ran like molasses"; that he complained to Mr. Keogh about the quality of the coal in the five car lot, a few days after they commenced to use it; also that he sent a sample of it to Keogh, in Chicago.

The whole of the ten cars of coal consisted of "Lincoln Nut", sometimes called "nut" and sometimes"#2 Nut." There is some evidence, which is very slight, however, by E. O. Stevenson, as to the quality of the coal and as to a

using sawdust and the ends of logs of wood and excelsior with the coal. Keogh testified further that he told Cone the coal might be good for a plant which had a large surplus of grate surface, and also that when the defendant bought the first two cars from Cone, meaning the Franklin County coal, he, Cone, was told about the plants and that they used wood as a fuel, together with the coal. On November 29, 1912, the defendant wrote the plaintiff, making for shipping directions "so that we may get rid of the objectionable fuel;" also on May 29, 1913, the defendant notified the plaintiff that the coal was still on the ground at Soldiers' Grove and East Dubuque, subject to the plaintiff's order.

The defendant's witnesses, Stevenson and Stanfort, who were fireman and foreman, respectively, for the defendant, at Soldiers' Grove, in the Summer and Fall of 1912, both testified that the first two cars of coal, meaning the Franklin coal, was satisfactory, but that the five cars, referring to the Mut coal, clinkered and ran. Stevenson testified, "It would run like tar, and it would fill the grates up," etc. "After I tried to burn it two or three weeks I quit entirely," and Stanfort testified, "it appeared to be soft and the clinkers ran like molasses"; that he complained to Mr. Keogh about the quality of the coal in the five car lot, a few days after they commenced to use it; also that he sent a sample of it to Keogh, in Chicago.

The whole of the ten cars of coal consisted of "Lincoln Mut", sometimes called "Mut" and sometimes "Mt. Mut." There is some evidence, which is very slight, however, by M. O. Stevenson, as to the quality of the coal and as to a

conversation between Fisher and Claude Stevenson, all of which, however, may be looked upon as of no material importance. The witness, Cone, for the plaintiff, denies categorically that he told Keogh, the witness for the defendant, that the ten cars of Lincoln Nut would be as good as Franklin coal, which he had previously shipped. He also testified that he had no recollection that he told Keogh that if he had known the condition at the plants he would not have shipped that coal; also that he did not recollect telling Keogh, when the latter requested to have the coal removed, that they had no place to which it could be removed; that Keogh showed him samples of the coal at his office, about October 25, 1912; that Lincoln #2 Nut is as good steam producing coal as can be found in and around Springfield; that he did not tell Keogh that he had #2 Lincoln Nut coal that produced as good results as Franklin County coal; that that would not be true; that in a conversation with Keogh, it was a question as to something cheaper, something that would answer the purpose and that would be cheaper than the Franklin. When, however, Cone was asked on his examination "you say you told Mr. Keogh that this Lincoln coal would answer his purpose," etc., he answered "Well, I inferred that it would, of course, I presume so;" that he could not answer whether he told Keogh that it would answer his purpose.

The five cars of coal at Soldiers' Grove and the five cars at East Dubuque, with the exception of a small portion of each amount which was used, remained in the yards of the defendant. The coal located at East Dubuque, within ten days or two weeks after it arrived, caught on

conversation between Parker and Glende Tavernous, all of which, however, may be looked upon as of no material importance. The witness, Cone, for the plaintiff, denies categorically that he told Cook, the attorney for the defendant, that the two cars of Lincoln Nut would be as good as Franklin coal, which he had previously shipped. He also testified that he had no recollection that he told Cook that if he had known the condition of the plants he would not have shipped that coal; also that he did not recollect telling Hough, when the latter requested to have the coal removed, that they had no place to work it could be removed; that Hough showed his samples of the coal at his office, about October 25, 1913; that Lincoln Nut is a good steam producing coal is and be found in and around Springfield; that he did not tell Hough that Lincoln Nut coal [illegible]; that [illegible] are [illegible] coal; that [illegible] not be true; that in conversation with Hough, it was a question as to [illegible] coal, and that would answer [illegible] Franklin. When, however, [illegible] "you may as you told Mr. Hough [illegible] would answer his inquiry," etc., [illegible] "Well, I [illegible] that it would, of course, [illegible]" [illegible] answer [illegible] in [illegible] [illegible] case.

The five cars of coal at Middleton, Ohio, and the five cars at Fort Dodge, [illegible] portion of each [illegible] yards of the defendant. The [illegible] within two weeks or two weeks [illegible], depend on

fire and burned for a year or more. The evidence shows that to load the coal on cars and take it away was more or less impracticable as it would cost five times as much as the original price of the coal.

The cause was tried in the lower court by the trial judge, without a jury, and a judgment in the sum of $702.15 was entered in favor of the defendant, upon its set-off.

It is contended by the plaintiff; (1) that the defendant, in its affidavit of merits and statement of claim, alleges that it bought "No. 2 Lincoln Nut" coal, and that the plaintiff did not deliver "No. 2 Lincoln Nut" but an inferior coal; that "No. 2 Lincoln Nut" was the name of a certain kind of coal known in commercial trade, and not a warranty that it would produce any given result.

There is some ambiguity in the use of the words "that the coal furnished defendant by plaintiff was not Lincoln Nut, as ordered, but was coal of an inferior quality." The affidavit of merits, however, states positively that the defendant objected to the quality of the coal as not being according toorder. Considering the whole of the affidavit of merits, we are of the opinion that it sets forth sufficient facts to apprise the plaintiff that it, the defendant, would undertake to show that the coal was not of the grade or quality ordered. Further, the record does not show that the defendant objected to any evidence on the ground that it did not tend to support the defense set up in the affidavit of merits. There is no doubt also but that the statement of claim of set-off sets up a breach of warranty and alleges damages arising there-

fire and burned for a year or more. The evidence shows that to load the coal on cars and take it away was more or less impracticable as it would cost five times as much as the original price of the coal.

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It is contended by the plaintiff; (1) that the defendant, in its affidavit of merits and statement of claim, alleges that it bought "No. 2 Lincoln Nut" coal, and that the plaintiff did not deliver "No. 2 Lincoln Nut" but an inferior coal; that "No. 2 Lincoln Nut" was the name of a certain kind of coal known in commercial trade, and not a warranty that it would produce any given result.

There is some ambiguity in the use of the words "that the coal furnished defendant by plaintiff was not Lincoln Nut, as ordered, but was coal of an inferior quality." The affidavit of merits, however, states positively that the defendant objected to the quality of the coal as not being according to order. Considering the whole of the affidavit of merits, we are of the opinion that it sets forth sufficient facts to support the claim-set that it, the defendant, would undertake to show that the coal was not of the kind or quality ordered. Further, the record does not show that the defendant objected to any evidence on the ground that it did not tend to support the defense set up in the affidavit of merits. There is no doubt also but that the statement of claim of set-off sets up a breach of warranty and alleges damages resulting there-

from, and sufficiently informed the plaintiff of the exact nature of the defendant's claim.

It is contended further, that no special warranty was established. It is, of course, true as claimed by the plaintiff that even if the plaintiff's statements amounted to a warranty, they must have been relied on by the purchaser to constitute a warranty in law, and that the burden of proof of a warranty and a breach thereof, is upon the party relying thereon as a defense, and that mere expressions of opinion by which the plaintiff commends his coal, will not create a warranty.

Applying those principles and assuming that the trial judge believed the testimony and evidence of the defendants, bearing in mind particularly the facts to which the witness Keogh testified, we are compelled to the conclusion that there was ample evidence that the plaintiff gave a warranty and broke it. If Cone, representing the plaintiff, in obtaining orders from Keogh, representing the defendant, led Keogh, representing the defendant, to believe, by the promise which he made, that the quality of the coal would be as good as the Franklin County coal, and to rely upon it, there is no doubt but that it constituted a warranty. The evidence as to the coal that was furnished being unsatisfactory and inferior xxxx is amply sufficient to prove that the coal was not of the quality represented and promised.

Upon a careful analysis of the evidence and an examination of the record, we are of the opinion that the

from, and sufficiently informed the plaintiff of the exact nature of the defendant's claim.

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Applying these principles and assuming that the trial judge believed the testimony and evidence of the defendants, bearing in mind particularly the facts to which the witness Keogh testified, we are compelled to the conclusion that there was ample evidence that the plaintiff gave a warranty and broke it. If Cone, representing the plaintiff, in obtaining orders from Keogh, representing the defendant, had Keogh, representing the defendant, to believe, by the promise which he made, that the quality of the coal would be as good as the Wyoming County coal, and to rely upon it, there is no doubt but that it constituted a warranty. The evidence as to the coal that was furnished being unsatisfactory and inferior xxxx is amply sufficient to prove that the coal was not of the quality represented and promised.

Upon a careful analysis of the evidence and an examination of the record, we are of the opinion that the

judgment of the trial court should be affirmed.

AFFIRMED.

Judgment of the trial court should be affirmed.

AFFIRMED.

204/529

Filed March 28, 1917

284 - 21680

E. I. DU PONT DE NEMOURS POWDER COMPANY, a corporation, Plaintiff, Defendant in Error, vs. E. H. H. ROBINSON & SON CONTRACTING COMPANY, a corporation, Defendant, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

204 I.A. 529

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is a suit brought in the Municipal Court for the balance of an account alleged to be due for explosives and blasting supplies. We shall refer to the parties by the titles used in the trial court.

On May 13, 1914, the plaintiff filed a statement of claim for the sum of $2427.14. On August 6, 1914, the defendant filed an affidavit of merits, in which affidavit of merits the defendant states that it never ordered the dynamite set down in the account attached to the statement of claim; that it ordered dynamite of a different kind and strength; that the defendant relied upon certain misrepresentations of the plaintiff as to the kind of dynamite that was shipped; that the dynamite that was shipped did not do the work and the defendant was damaged in a sum exceeding the amount sued for.

On September 22, 1914, the court struck the defendant's affidavit of merits from the files and by leave of court the defendant on October 1, 1914, filed

an amended affidavit of merits, in which the defendant reiterated what it had set forth in its original affidavit of merits, and also added thereto certain allegations in regard to the alleged deceit and fraud of the plaintiff in regard to the particular dynamite that had been furnished.

On April 7, 1915, the plaintiff, by leave of court, filed an amended statement of claim. It is a voluminous document covering, together with the exhibits, 54 pages of the abstract. It consists substantially of a repetition of that which was alleged in the original statement, together with what purports to be an answer to certain allegations in the amended affidavit of merits.

On April 27, 1915, the defendant filed an amended affidavit of merits, which said affidavit of merits was on June 2, 1915, stricken from the files. On the same day the defendant moved to strike the plaintiff's amended statement of claim from the files, which motion was overruled. The defendant then filed a "second amended affidavit of merits and set-off." In the latter affidavit of merits the defendant states that it "never ordered the dynamite set down in the account attached to the statement of claim filed by the plaintiff;" that it ordered dynamite of a different kind and strength; that it undertook to do certain excavation work for the Sanitary District of Chicago; that the plaintiff recommended the use of nitro-glycerine dynamite; that the defendant contracted with the plaintiff for a supply of necessary explosives for the prosecution of said work; that nitro glycerine was the best adapted for the work; that certain quantities of explosive on the order of the defendant were delivered to the defendant; that it was impossible for the defendant to distinguish that which it re

it received from the nitro-glycerine dynamite it had ordered; that the explosive so delivered was of an inferior grade and kind and not adapted for said work; that the fact was well known to plaintiff; that it ordered from plaintiff further supplies of the same grade and kind of explosive as in its first order; that it received from plaintiff the quantities of explosives so ordered believing it to be of the kind and grade it had first ordered; that in fact it was all of the inferior grade and was known to be such by the plaintiff; that such knowledge was by plaintiff concealed from the defendant; that the plaintiff as the work progressed inspected it and directed the manner in which said explosives should be used; that defendant not obtaining the proper results from said explosives notified plaintiff; at request the plaintiff inspected the work and advised defendant that the explosives were all nitro-glycerine dynamite; that defendant relying upon said representations continued the use of said explosives from September 5, 1913, to June 24, 1915; that at various times during said period plaintiff fraudulently and deceitfully represented to defendant that the dynamite being furnished was nitro-glycerine dynamite and was of the kind, quality and strength ordered by the defendant; that in fact the dynamite so furnished was not nitro-glycerine dynamite; that the defendant having no knowledge and no other means of obtaining information as to the truth and correctness of the representations so made by plaintiff and believing and relying implicitly thereon, continued to use said dynamite as directed by plaintiff in mining; said excavating; that the defendant about December 21, 1913, notified the plaintiff of its intention to have said explosives analyzed to ascertain their quality; that

the plaintiff has admitted that the explosives it had furnished were not the grade ordered but an inferior grade; that it, the defendant, was compelled to do certain blasting and excavation work over again by reason of the inferior quality of the explosives delivered by the plaintiff; that because of the facts set forth, it, the defendant, was greatly damaged in a sum far exceeding the amount sued for by the plaintiff.

On June 3, 1919, the foregoing amended affidavit of merits was withdrawn from the files, and the defendant electing to stand by its amended affidavit of merits, the trial judge entered judgment for the plaintiff in the sum of $2287.11.

It is contended by the defendant that the second amended affidavit of merits should not have been stricken from the files; that it not only sufficiently denied plaintiff's demand, but also set up a defense by way of recoupment. On the other hand, it is contended by the plaintiff that the second amended affidavit of merits violated Rule 32 of the Municipal Court.

Succinctly stated, the second amended affidavit of merits sets forth as a defense (1) that it, the defendant, never ordered the dynamite referred to in the account attached to the statement of claim; (2) that it ordered dynamite of a different kind and strength; (3) that the plaintiff in purporting to fill the orders of the defendant and in delivering what is represented as dynamite, was guilty of fraud and deceit, which fraud and deceit are set forth in some detail. Upon a careful scrutiny of the second amended affidavit of merits, we are of the opinion that it is not sufficient; that, considered as a pleading,

is in particularly direct and expressive, and deals specifically with the material allegations of the statement of claim. Lukens v. Gate of Illinois, 271 Ill. 404. It recites very much in detail a series of facts, which when taken together, justify the conclusion that if they are proven, a fraud was perpetrated by the plaintiff and the defendant Lucent upon, that there never was delivered by the plaintiff to the defendant the merchandise in dispute. It is evident, of course, will take judicial notice that dynamite is an explosive and its quality could not be determined by the defendant unless by using it and considering its results, or by having made an expert chemical analysis of it. A mere examination of the boxes and their contents would not necessarily inform the defendant of the quality of the dynamite. It is also true that an opportunity to examine the dynamite and its subsequent use by the defendant does not constitute an admission to the quality in each instance and bind it conclusively to the contract. The cases cited by the plaintiff, [illegible] v. [illegible], [illegible] Ill. App. 104, and [illegible] v. [illegible], [illegible] Ill. App. 407, are [illegible] not in point.

The plaintiff in its amended statement of claim alleges that the defendants had not licensed to do business in the State of Illinois; also that the defendant had failing in the Superior Court of Cook County [illegible] for the purpose of recovering unliquidated damages for an alleged breach of the contract in this case. The allegations in regard to the lien numbers are inappropriate and of no [illegible] that be set forth in the plaintiff's statement of claim. As to the allegations pertaining to the defendant not [illegible] licensed to do business in the State of Illinois, they are insufficient

denied in the affidavit of merits.

The great volume of pleadings in this case, having special reference to the plaintiff's amended and additional statement of claim, compel us to condemn such a misuse of the rules of the Municipal Court, believing as we do that these rules were adopted rather to prevent than to increase the prolixity of pleadings in the Municipal Court.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

317 - 21713

J. S. HOFFMAN COMPANY,
a corporation,
Defendant in Error,

vs.

STERLING PACKING COMPANY,
a corporation,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

204 I.A. 531

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is a suit brought by the defendant in error (hereinafter called the plaintiff) against the plaintiff in error (hereinafter called the defendant) for the sum of $975.25, for goods sold and delivered and upon an account stated. The chief question in the case is whether the trial judge erred in striking the amended affidavit of merits and amended statement of set-off and entering judgment, upon the plaintiff's statement of claim, against the defendant.

The affidavit of merits consists of four paragraphs; the first paragraph alleges a sale and delivery of certain barrels of dried beef on an open account; that the plaintiff represented the merchandise to be of first class quality; that the defendant relying on that representation and before inspection paid to the plaintiff the purchase price; that upon inspection the defendant found the merchandise was of an inferior quality and not as represented and guaranteed by plaintiff and ordered by the defendant; that upon the discovery that the merchandise was not as guaranteed

1. S. HOFFMAN COMPANY, a corporation, Defendant in error.	
vs.	MUNICIPAL COURT OF DENVER.
STERLING PACKING COMPANY, a corporation, Plaintiff in error.	

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is a suit brought by the defendant in error (hereinafter called the plaintiff) against the plaintiff in error (hereinafter called the defendant) for the sum of $275.25, for goods sold and delivered and upon an account stated. The chief question in the case is whether the trial judge erred in striking the amended affidavit of merits and sustaining a demurrer to the entire judgment, upon the plaintiff's statement of claim, against the defendant.

The affidavit of merits consists of four paragraphs; the first paragraph alleges a sale and delivery of certain barrels of dried beef on an open account; that the plaintiff represented the merchandise to be of first class quality; that the defendant relying on that representation and before inspection paid to the plaintiff the purchase price; that upon inspection the defendant found the merchandise was of an inferior quality and not as represented and guaranteed by plaintiff and agents by the defendant; that upon the discovery that the merchandise was not as represented

nor as represented, the defendant rescinded the sale and returned the warehouse receipt to the plaintiff.

The second paragraph alleges the sale and representation as in the first paragraph and alleges delivery of the merchandise by the plaintiff to a public warehouse to the order of the defendant; that among persons dealing in dried beef at wholesale in the City of Chicago and elsewhere there was prevailing a general custom that each barrel of dried beef constitutes a separate lot, subject to inspection and return if not as represented; that relying upon the representations made by the plaintiff as to the quality of the beef, the defendant before inspection paid to the plaintiff the purchase price of the dried beef; that upon inspection the dried beef was found not to be as represented and guaranteed; that thereupon the defendant rescinded the sale and returned the warehouse receipt to the plaintiff.

The third paragraph is substantially the same as the second, but alleges a general custom known to the plaintiff that if any portion of the deliveries of dried beef is not as represented, then under certain circumstances, such as are set out in the third paragraph, there is a right to return to the seller such separate pieces of beef as are not according to the contract of sale, and a duty on the part of the vendor to accept a return and credit the purchase price of the same to the buyer.

The fourth paragraph is like the third, save that it does not allege on the part of the plaintiff any knowledge of the custom.

nor be represented, the defendant rescinded the sale and returned the warehouse receipt to the plaintiff.

The second paragraph alleges the sale and representation as in the first paragraph and alleges delivery of the merchandise by the plaintiff to a public warehouse to the order of the defendant; that among persons dealing in dried beef as merchandise in the city of Chicago and elsewhere there was prevailing a general custom that each barrel of dried beef constitutes a separate lot, subject to inspection and return if not as represented; that relying upon the representations made by the plaintiff as to the quality of the beef, the defendant before inspection paid to the plaintiff the purchase price of the dried beef; that upon inspection the dried beef was found not to be as represented and guaranteed; that thereupon the defendant rescinded the sale and returned the warehouse receipt to the plaintiff.

The third paragraph is substantially the same as the second, but alleges a general custom known to the plaintiff that if any portion of the delivered of dried beef is not as represented, then under certain circumstances, which as are set out in the third paragraph, there is a right to return to the seller such repudiated pieces of beef as are not according to the contract of sale, and a duty on the part of the vendor to account a return or credit the purchase price of the same to the buyer.

The fourth paragraph is like the third, save that it does not allege on the part of the plaintiff any knowledge of the custom.

The defendant's statement of set-off consists substantially of similar averments to those contained in the amended affidavit of merits.

It is claimed by the defendant that under Rule 22 of the Municipal Court, the court has the power to strike a pleading and render judgment only when the defense is clearly unfounded in law.

On the other hand, the plaintiff contends (1) that the defendant's pleadings do not state facts showing that the beef it offers to return was inspected and tendered back to the seller within a reasonable time after delivery; (2) that they do not state the facts showing that the defendant notified the plaintiff of the defects in the beef and gave the plaintiff an opportunity to replace the same with beef of the agreed quality; (3) do not show a defense to the plaintiff's statement of claim because an entire contract cannot be rescinded in part; (4) that the transaction was an executed sale which the buyer cannot rescind for breach of warranty where no fraud is alleged; (5) that the customs alleged are unreasonable, indefinite and uncertain and in contravention of general policy and are not competent in evidence in this case; (6) that they show an unliquidated claim arising out of different transactions from that upon which plaintiff's claim is based and cannot be set-off or recouped in this suit; (7) that they do not show that defendant's set-off accrued before the plaintiff's suit was filed.

Inasmuch as it has been decided that one of the intentions of the Municipal Court Act was to simplify plead-

The defendant's statements of set-off contain substantially or similar averments to those contained in the amended affidavit of merits.

It is claimed by the defendant that under Rule 32 of the Municipal Court, the court has the power to strike a pleading and render judgment only when the defense is clearly unfounded in law.

On the other hand, the plaintiff argues (1) that the defendant's pleadings do not state facts showing that the beef is offers to return was impounded and tendered back to the seller within a reasonable time after notice; (2) that they do not state the facts showing that the defendant notified the plaintiff of the defects in the beef and gave the plaintiff an opportunity to replace the same with beef of the agreed quality; (3) do not show a defense to the plaintiff's statement of claim because an oral contract cannot be rescinded in part; (4) that the transaction was an executed sale which the buyer cannot rescind for breach of warranty where no fraud is alleged; (5) that the matters alleged are unmerchantable, indefinite and uncertain and in contravention of general policy and are not competent in evidence in this case; (6) that they show an unliquidated claim arising out of different transactions from that upon which plaintiff's claim is based; (7) that they do not [illegible] recouped in this suit; (8) that they do not [illegible] defendant's set-off accrued before the plaintiff's suit was filed.

Inasmuch as it has been decided [illegible] one of the [illegible] of the municipal court [illegible] [illegible]

ings, and as Rule 22 of the Municipal Court provides that "if it appears that the party filing a statement of claim or affidavit is relying on a cause of action or defense that is clearly unfounded in law, the court may order the same stricken out and the action to be dismissed or judgment to be entered accordingly as may be just," it would seem to follow that where a defendant undertakes to set up in its affidavit of merits the defense of rescission, it is not necessary to set out in detail every fact and element that would be necessary to make a complete defense, and, a fortiori, it is not necessary to set forth those facts, which if proven, might defeat his alleged defense. (Emberg v. City of Chicago, 271 Ill. 404). For example, the plaintiff claims that the defendant's affidavit of merits fails to show that there was an offer to return the merchandise within a reasonable time. What is a reasonable time is usually a question of fact for a jury and varies with the different facts and circumstances of each particular case. Plaintiff contends that there is no allegation as to when the inspection was made, "not even that it was made within a reasonable time," and that "the buyer, in order to show a prima facie right to rescind, must allege that he is inspected within a reasonable time after receiving the goods." Bearing in mind, however, the purpose of the Municipal Court Act and the meaning of the rule above mentioned, we are of the opinion that it is not necessary for a defendant in an affidavit of merits and in a statement of set-off in such a case as this, where the defense is based upon rescission and an alleged custom, to set forth more than is sufficient to inform the plaintiff of the nature of the claim. It must be borne in mind that it is a pleading we are dealing with and not proof.

law, and as Rule 32 of the Michigan Court provides that "if it appears that the party filing a statement of claim or affidavit is relying on a cause of action or defense that is clearly unfounded in law, the court may order the same stricken out and the action to be dismissed or judgment to be entered accordingly as may be just," it would seem to follow that where a defendant undertakes to set up in his affidavit of merits the defense of rescission, it is not necessary to set out in detail every fact and element that would be necessary to make a complete defense, and, a fortiori, it is not necessary to set forth those facts, which if proven, might defeat his alleged defense. (Kenyon v. City of Detroit, 171 Mich. 464). For example, the plaintiff claims that the defendant's affidavit of merits fails to show that there was an offer to return the merchandise within a reasonable time. That is a reasonable view to take, namely a question of fact for a jury and a factor which the affidavit does not eliminate by some positive show. Plaintiff contends that there is no allegation as to when the transaction was made, nor even that it was made within a reasonable time," and that "the buyer, in order to show a valid legal right to rescind, must allege that he is interested within a reasonable time after receiving the goods." Nothing is said, however, the purport of the Michigan court not as to meaning of the rule above mentioned, as are of the opinion that it is not necessary for a defendant in an affidavit of merits and in a statement of set-off in also a case on file, as is the defense is based upon rescission and not a legal action, to set forth more than is sufficient to inform the opposite party of the nature of the claim. It must be borne in mind that in a pleading we are dealing with and not proof.

The plaintiff claims that the customs alleged by the defendant are unreasonable, indefinite and uncertain. It would seem, however, to be sufficient in such a pleading for the defendant to inform the plaintiff that he intended relying upon a certain general custom, the nature of which is expressly set forth. Whether or not such a custom is reasonable, or as the plaintiff claims, in contravention of general policy, are matters to be gone into only in the course of actual trial.

After carefully considering the amended affidavit of merits and amended statement of set-off, we are of the opinion that it was error to strike them from the files and enter judgment for the plaintiff. The judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

The plaintiff claims that the customs alleged by the defendant are unreasonable, indefinite and uncertain. It would seem, however, to be sufficient in such a pleading for the defendant to inform the plaintiff that he intended relying upon a certain general custom, the nature of which is expressly set forth. Whether or not such a custom is reasonable, or as the plaintiff claims, in contravention of general policy, are matters to be gone into only in the course of actual trial.

After carefully considering the amended affidavit of merits and amended statement of set-off, we are of the opinion that it was error to strike them from the files and enter judgment for the plaintiff. The judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

348 - 21745

H. & M. STAFFORD and
G. C. and E. M. STAMM,

Defendants in Error,

vs.

FRANCES H. WARD,

Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

204 I.A. 532

MR. JUSTICE TAYLOR delivered the opinion of the court.

On June 10, 1915, the defendants in error (hereinafter called plaintiffs) obtained judgment by confession, upon a warrant of attorney in a written lease, for $130.00 and costs against the plaintiff in error, (hereinafter called the defendant.)

On July 30, 1915, the defendant moved the court to vacate the judgment and for leave tofile an affidavit of merits instanter, The affidavit set forth, among other things, that she, the defendant, "entered into a written lease with the plaintiffs herein for the rent of an apartment of one of the plaintiffs' buildings, and also entered into an oral agreement with said plaintiffs for the rental of an additional room in the janitor's quarters in the basement of said building for her maid;" that she, the defendant, "entered into said written lease wholly upon the oral agreement to be permitted to have the use of this additional room in the basement of said building for her maid, as aforesaid, and that the time for which she was to have the use of said room was to expire at the time of the expiration of said lease;" "that the janitor of said building and employed by said plaintiffs, caused the maid so much annoyance and dis-

548 - 31743

H. & M. STARKING and G. C. and M. M. STARK, Defendants in Error,	ERROR TO MUNICIPAL COURT OF CHICAGO.
vs.	
MARGUERITE K. STARK, Plaintiff in Error.	

MR. JUSTICE TAYLOR delivered the opinion of the court.

On June 10, 1918, the defendants in error (hereinafter called plaintiffs) obtained judgment by confession, upon a warrant of attorney in a written lease, for $130.00 and costs against the plaintiff in error, (hereinafter called the defendant.)

On July 30, 1918, the defendant moved the court to vacate the judgment and for leave to file an affidavit of merits instanter. The affidavit set forth, among other things, that she, the defendant, "signed into a written lease with the plaintiffs herein for the rent of an apartment of one of the plaintiffs' buildings, and also entered into an oral agreement with said plaintiffs for the rental of an additional room in the janitor's quarters in the basement of said building for her maid; that she, the defendant, "entered into said written lease wholly upon the oral agreement to be permitted to have the use of this additional room in the basement of said building for her maid, as aforesaid, and that the time for which she was to have the use of said room was to coincide at the time of the expiration of said lease;" "that the janitor of said building and employed by said plaintiffs, caused the maid to much annoyance and dis-

turbance that it was impossible for her to live in said room;" "that she made complaint to plaintiffs of the existence of such annoyance and disturbance;" "that plaintiffs did not prevent said annoyance and it thereupon became necessary for said maid to vacate said room;" that the defendant being deprived of said room it became necessary for her to obtain another apartment; that the rental sued for accrued after the defendant moved from said premises.

The trial judge denied the motion to vacate. On August 9, 1915, a motion was made by the defendant to vacate the order of July 30, 1915, and also to vacate the judgment and to grant the defendant leave to file an affidavit of merits, supported by affidavits. The defendant presented two affidavits of merits, only one of which, the affidavit of the defendant, it is necessary to consider. That affidavit recites "that at the time of the leasing and demising by plaintiff of the premises occupied by defendant it was mutually agreed and understood that the premises so leased were to consist of five certain rooms on one floor and one room on another floor in the same building; that said room was in that portion of the building used by the janitor and was to be occupied by defendant's maid; that the entering into the contract for the rental of plaintiffs' premises was made expressly on the condition that the demised premises contain the six rooms aforesaid; that by mutual agreement of said plaintiffs and defendant, it was agreed that the premises thus leased were the six rooms aforesaid; that defendant entered upon and occupied the said six rooms so leased as aforesaid; that because of annoyances, inconveniences,

turbance that it was impossible for her to live in said room;" "that she made complaint to plaintiffs of the existence of such annoyance and disturbance;" "that plaintiffs did not prevent said annoyance and it thereupon became necessary for said maid to vacate said room;" that the defendant being deprived of said room it became necessary for her to obtain another apartment; that the rental sued for accrued after the defendant moved from said premises.

The trial judge denied the motion to vacate. On August 9, 1913, a motion was made by the defendant to vacate the order of July 30, 1913, and also to vacate the judgment and to grant the defendant leave to file an affidavit of merits, supported by affidavits. The defendant presented two affidavits of merits, only one of which, the affidavit of the defendant, it is necessary to consider. That affidavit recites "that at the time of the leasing and demising by plaintiff of the premises occupied by defendant it was mutually agreed and understood that the premises so leased were to consist of five certain rooms on one floor and one room on another floor in the same building; that said room was in that portion of the building used by the janitor and was to be occupied by defendantile maid; that the entering into the contract for the rental of plaintiffs' premises was expressly on the condition that the demised premises contain the six rooms aforesaid; that by mutual agreement of said plaintiffs and defendant, it was agreed that the premises thus leased were the six rooms aforesaid; that defendant entered upon and occupied the same six rooms so leased

quarrels and disturbances of the janitor with defendant's maids, divers maids refused to live in said room and left the employ of said defendant; that the defendant complained to the plaintiff and announced her intention of leaving and abandoning the premises because of the unbearable and irremediable condition; that plaintiff said 'they had done all they could, but that they didn't blame defendant and didn't see how she could do otherwise,' and on May 1, 1915, defendant did vacate and abandon said premises."

The trial judge denied the motion of August 9, 1915 to vacate the judgment entered on June 10, 1915.

It is contended by the defendant (1) that the affidavit sets forth an oral agreement collateral to the written lease; (2) that "in a suit to recover rent brought by the landlord upon a written sealed lease, complete upon its face, a tenant may prove an independent contract collateral to the lease, notwithstanding such contract was oral and the lease in writing and under seal, that as an inducement and consideration for the written lease the landlord agreed to rent other premises;" (3) that if there is no express covenant in a lease relating to peaceable and quiet enjoyment, the law implies one; (4) that a breach of peaceable and quiet enjoyment of part of the premises on the part of an agent or the landlord is a ground for refusal to pay rent.

An examination of the latter affidavit shows that it was therein claimed by the defendant that there was a mutual agreement and understanding that the premises leased were to consist of five certain rooms on one floor and one room on another floor, in the same building. It is not

quarrels and disturbances of the janitor with defendant's maids, divers maids refused to live in said room and left the employ of said defendant; that the defendant complained to the plaintiff and announced her intention of leaving and abandoning the premises because of the unbearable and intolerable condition; that plaintiff said 'they had done all they could, but that they didn't blame defendant and didn't see how she could do otherwise,' and on May 5, 1919, defendant did vacate and abandon said premises."

The trial judge denied the motion of August 5, 1919 to vacate the judgment entered on June 10, 1919.

It is contended by the defendant (1) that the affidavit sets forth an oral agreement collateral to the written lease; (2) that "in a suit to recover rent brought by the landlord upon a written sealed lease, complete upon its face, a tenant may prove an independent contract collateral to the lease, notwithstanding such contract was oral and the lease in writing and under seal, that no in-dorsement was considered for the written lease the landlord agreed to rent other premises;" (3) that it shows an express covenant in a lease relating to peaceable and quiet enjoyment, the law implies one; (4) that a breach of peaceable and quiet enjoyment of part of the premises on the part of an agent or the landlord is a ground for refusal to pay rent.

An examination of the affidavit shows that it was therein claimed by the defendant that there was a mutual agreement and understanding that the premises leased were to consist of five certain rooms on one floor and one room on another floor, in the same building. It is not

stated whether that mutual agreement and understanding was the result of the written lease alone, or the written lease and an oral agreement taken together. The terms of the written lease itself do not include the so-called maid's room which was situated on another floor in the same building. The statement in the affidavit that the entering into the contract for the rental of plaintiffs' premises was made expressly upon the condition that the demised premises contained the six rooms aforesaid, involves an enlargement of the terms of the written contract. The further statement "and by mutual agreement of said plaintiffs and defendant it was agreed that the premises thus leased were the six rooms aforesaid" is the announcement of an agreement inconsistent with the terms of the written lease. What constituted that "mutual agreement" is not stated; that is, whether it was created by the terms of the written lease, or by the terms of the written lease together with some oral contract.

In the earlier affidavit, that of July 30, 1915, the defendant set forth that she entered into an oral agreement for the rental of an additional room in the basement; that she "entered into said written lease only upon the oral agreement to be permitted to have the use of this additional room in the basement of said building for her maid as aforesaid, and that the time for which she was to have the use of said room was to expire at the time of the expiration of said lease." It would seem, therefore, that the defendant is endeavoring to make a violation of an alleged oral lease a breach of a separate and distinct written lease under seal and of

stated whether that mutual agreement and understanding was the result of the written lease alone, or the written lease and an oral agreement taken together. The terms of the written lease itself do not include the so-called maid's room which was situated on another floor in the same building. The statement in the affidavit that the entering into the contract for the rental of plaintiff's premises was made expressly upon the condition that the demised premises contained the six rooms aforesaid, involves an enlargement of the terms of the written contract. The further statement "and by mutual agreement of said plaintiffs and defendant it was agreed that the premises thus leased were the six rooms aforesaid" is the announcement of an agreement inconsistent with the terms of the written lease. That contradicted that "mutual agreement" is not stated; that is, whether it was created by the terms of the written lease, or by the terms of the written lease together with some oral contract.

In the earlier affidavit, that of July 20, 1915, the defendant set forth that she entered into an oral agreement for the rental of an additional room in the basement; that she delivered the said written lease only upon the oral agreement to be permitted to have the use of this additional room in the basement of said building for her maid as aforesaid, and that the time for which she was to have the use of said room was to expire at the time of the expiration of said lease." It would seem, therefore, that the defendant is endeavoring to make a violation of an alleged oral lease a breach of a separate and distinct written lease under seal and of

different premises. Further, the written lease was for a period of two years; and if the time, at which the oral agreement as to the maid's room "was to expire" was the "time of the expiration of said lease" (meaning the written lease), obviously the oral agreement would be within the condemnation of the statute of frauds.

Both of the affidavits are somewhat ambiguous, but each seems to suggest an effort to vary the terms of the written lease, under seal, by a parol agreement, Of course, the rule is well known that parol evidence is not admissible to vary the terms of a written agreement under seal. Cooney v. Murray, 45 Ill. App. 463.

An oral agreement may have been made in regard to the leasing of the maid's room, which room did not constitute part of the premises mentioned in the written lease. But an eviction therefrom, that is, the maid's room, would not be an eviction as to the premises covered by the written lease. In order for an eviction from the maid's room to be an eviction as to the premises covered by the written lease, it would be necessary to consider the apartment and the maid's room as covered by the written lease, and that is a non sequitur. An analysis of the affidavits, made with a spirit of indulgence towards the defendant, as the case is a judgment by confession, compels us to the conclusion that no sufficient defense is therein set forth. Assuming, therefore, as we are bound to do, that the defendant has set up in her affidavits all the defense she has, no substantial advantage would be gained by her, if this court should order the judgment vacated. We are of the opinion that the judgment of the lower court must be affirmed.

AFFIRMED.

different premises. Further, the written lease was for a period of two years; and if the time, at which the oral agreement as to the maid's room "was to expire" was the "time of the expiration of said lease" (meaning the written lease), obviously the oral agreement would be within the condemnation of the statute of frauds.

Both of the affidavits are somewhat ambiguous, but each seems to suggest an effort to vary the terms of the written lease, under seal, by a parol agreement. Of course, the rule is well known that parol evidence is not admissible to vary the terms of a written agreement under seal. Mooney v. Murray, 45 Ill. App. 443.

An oral agreement may have been made interposed to the leasing of the maid's room, which room did not constitute part of the premises mentioned in the written lease. But an evidence therefrom, that is, the maid's room, would not be an evidence as to the premises covered by the written lease. In order for an evidence from the maid's room to be an evidence as to the premises covered by the written lease, it would be necessary to connect the agreement and the maid's room as covered by the written lease, and that is a non sequitur. An analysis of the affidavits, made with a spirit of judgment towards the statement, as the case is a judgment by motion, compels us to the conclusion that no sufficient defense is the main set forth. Assuming, therefore, as we are bound to do, that the statement has set up in the affidavits all the defense we have, no substantial advantage could be gained by her, if this court should order the judgment vacated. We are of the opinion that the judgment of the lower court

2750

April

Gen. No. 6553. ~~October~~ **Term, 1916.** **Ag. No. 4.**

James E. Johnson, Conservator of Mary A. Taff, Appellant.

vs.

W. O. Taff, Appellee.

Appeal from Sangamon

Opinion by Thompson, P. J.

In December, 1913, James E. Johnson, conservator of Mary A. Taff, filed a bill in equity in the circuit court of Sangamon county, against W. O . Taff, praying to have a bill of sale dated June 4, 1910, conveying certain personal property to the defendant, for the consideration of $1000 in hand paid, and a lease dated December 16, 1911, by which Mary A. Taff leased to the defendant, 140 acres of land from March 1, 1914, to March 1, 1919, for an annual rental of $500 the first payment of $500 to be made January 1, 1914, and similar payments on the first of January of each year thereafter.

The bill alleges that in October, 1913, James E, Johnson was appointed conservator of the person and estate of Mary A. Taff, by the probate court of Sangamon county; that at the time of executing the said bill of sale and lease, Mary A. Taff was not of sound mind but was in her dotage and her mind and memory were so imparied that she was incapable of transacting ordinary business and that the said W. O. Taff "resorted to falsehood and misrepresentation to induce the said Mary A. Taff to execute the said instrument and that the said Mary A. Taff was under improper re-

(Page 1)

straint and undue influence,"

and that the rent reserved is inadequate and only a small part of the rental value of the premises. That possession of the personal property described in the bill of sale remained with Mary A. Taff until about the time the conservator was appointed, and that the consideration mentioned in the bill of sale has never been paid.

The answer of the defendant admits the conservatorship of James E. Johnson and the making of the bill of sale and lease, but denies the other allegatioos of the bill and asserts that Mary A. Taff was at the time alleged and still is perfectly competent to manage her business.

The cause was referred to the master in chancery to take the evidence and report it with his conclusions. The master reported that the evidence fails to show that Mary A. Taff was incompetent to transact ordinary business at the time of the transactions, and that the bill should be dismissed for want of equity. Objections

to the findings were overruled by the master and on a hearing on exceptions a decree was entered dismissing the bill for want of equity. The complainant appeals.

The court by the decree found that Mary A. Taff, in the spring of 1909, was living with three of her children, Charles, Frank and Linda, on the farm involved; that at that time she made an agreement with her children, which involved the personal property and real estate in which her deceased husband, herself and children had an interest, under which she conveyed that part of the real estate which she owned in fee to her child-

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dren reserving a life estate for herself, and a life estate was conveyed to her in other real estate owned in fee by her children; that afterwards in 1909, Mary A. Taff began a suit against all her children except W. O. Taff, to set aside the agreement and deeds, but on the trial they were held valid and her bill was dismissed; that on September 1, 1908, Mary A. Taff made a lease by which she leased to W. O. Taff, the premises in controversey from December 1, 1908 to March 1, 1914, at an annual rent of $500 per year and that Charles, Frank and Linda Taff about that time left said premises and W. O. Taff took possession and Mary A. Taff since that time has made her home with him; that on December 16, 1911, Mary A. Taff, by another indenture, leased said premises to W. O. Taff for five years beginning March 1, 1914; and that on June 4, 1910, Mary A. Taff by a bill of sale sold to W. O. Taff the personal property turned over to her in the settlement with her children, and that the sale of the personal property and the second lease were bona fide transactions and payment was made in full of the consideration mentioned in the bill of sale and of the rent reserved in the lease.

The principal contention of the appellant is that the court erred in not finding that a fiduciary or confidential relation existed between W. O. Taff and Mary A. Taff at the time of the execution of the instruments sought to be held void, and that the burden was upon the appellee to show the validity of the transactions in controversy.

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The bill neither directly nor indirectly alleges that any fiduciary relation existed between the parties. There is no allegation that the parties were parent and child. So far as the bill is concerned the parties appear to be complete strangers and under no obligation to each other. "Although a complainant may make out by proof

to the findings were overruled by the master and on a hearing on exceptions a decree was entered dismissing the bill for want of equity. The complainant appeals.

The court by the decree found that Mary A. Taft, in the spring of 1895, was living with three of her children, Charles, Frank and Linda, on the farm involved; that at that time she made an agreement with her children, which involved the personal property and real estate in which her deceased husband and children had an interest, under which she conveyed that part of the real estate which she owned in fee to the child

(Page 2)

dren reserving a life estate for herself and a life estate was conveyed to her in such real estate owned in fee by her children; that afterwards in [illegible] Mary A. Taft began a suit against all her children except W. O. Taft, to set aside the agreement and deeds, but on the trial they were held valid and her bill was dismissed; that on September 1, [illegible], Mary A. Taft [illegible] which she leased to W. O. Taft, [illegible] and [illegible] Charles, Frank and Linda Taft [illegible] W. O. Taft [illegible] Mary A. Taft [illegible] has made her home with [illegible] December [illegible]. Mary A. Taft [illegible] to W. O. Taft [illegible] that on [illegible] to W. O. Taft [illegible]

[illegible]

controversy.

(Page 3)

The bill [illegible]

[illegible] is no allegation that the [illegible] so far as the [illegible] complete [illegible]

a case which entitles him to relief, yet he can have no decree unless the allegations of the bill are adapted to the case proved." 3 Encyc. Pl & Pr. 357. There is no direct allegation in the bill, nor is there any from which inferences can be drawn, which when proved will cast the burden of proof on appellee. There is also a difference between the rules applied to transfers made by a parent to a child and by a child to a parent, if the question argued had been properly raised by the pleading. "There is no presumption of law that a conveyance from a parent to a child is the product of fraud or undue influence, (Sears vs. Vaughan, 230 Ill. 572,) but there must be proof of fraud and undue influence in fact." Hudson vs. Hudson, 237 Ill. 9; Smith vs. Kopitzki, 254 Ill. 498.

The evidence shows that Mary A. Taff was of the age of sixty-three years in 1911, that her husband had died in 1904, leaving her and seven children surviving him; that she and her husband owned 140 acres of land jointly; that after her husband's death, she and three of the children, Charles, Frank and Linda, continued to live on and run the farm until the fall of 1908, when Mrs. Taff became dissatisfied with the way these children

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ren were running the farm. Appellee is a son of Mary A. Taff and at that time lived on a farm about twelve miles from his mother. When she became dissatisfied with the way Charles, Frank and Linda were running the farm she made several visits to appellee, and persuaded him to give up his farm and lease the home farm for five years at a rental of $500 per year. After this lease was made a division of the personal property on the farm was made between her and the three children who had been on the farm with her, and she then sold her part of the personal property to appelle for $1000, and a year afterwards, when the consideration had been paid the bill of sale was made transferring the property to him.

When the personal property was divided between the three children and Mrs. Taff, all the children but one, who was ill at the time but who afterwards confirmed and joined in the transaction, were present and deeds were made by which she conveyed to her children the fee in the half of the farm that she owned, reserving for herself, a life estate therein, and she was given the use for her life of the other half, the fee of which was in the children. After this she claimed that she did not know she had made a conveyance of the fee and

brought suit in November 1909, to set aside the deeds. The appellee took the side of his mohter against the other children. That suit was decided against the mother. In December, 1911, appellee was talking of moving to Canada with some of his neighbors and to keep him with her, Mrs. Taff executed the second lease.

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The bill does not allege for what reason a conservator was appointed. The evidence shows that after the first lease was made in 1908, all the children considered Mrs. Taff competent to agree on a division of the personal property and after the verbal contract for the sale of the property they considered her competent to make deeds of her land to them. In 1913, Frank and others of her children, who in this suit testified she was incompetent to do business, were trying to persuade her to make a lease of the land to Frank when the first lease should expire, if appellee should not remain after that time. Their testimony is impeached by their actions. At the time they were trying to make a contract with her after the time of making the instruments assailed in this suit, she was competent to transact her business.

Mrs. Taff was a witness and her testimony, with her bank account from September 1908, to October 1913, introduced in evidence would appear to demonstrate her mental capacity. There were ten witnesses for complainant who testified that her memory and mental capacity were failing from the spring of 1910. Five of these witnesses were her children who are interested in the case, and an exhibit in evidence shows that three of these children about the time the contracts in controversy were made were recipients of her bounty to the extent of several hundred dollars. Eight witnesses, all disinterested, who lived near her and had known her for many years testified that she was mentally capable of transacting ordinary business.

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We conclude that there was no error in the finding of the court that Mary A. Taff had sufficient mental capacity to transact ordinary business at the time of the execution of the bill of sale and the second lease. There is no evidence whatever of any misrepresentation, improper restraint or undue influence. The preponderance of the evidence is that she executed the instrument sought to be declared void understandingly and of her own free will. The decree is affirmed.

Affirmed.

(Page 7)

brought suit in November 1909, to set aside the deeds. The appellee took the side of his mother against the other children. That suit was decided against the mother. In December, 1911, appellee [illegible] to induce to change with [illegible] keep him with her. [illegible]

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[illegible]

Affirmed.

4/15/17

2751

Gen. No. 6590. October Term, 1916. Ag. No. 7.

Mattie Hazel Moore Shaffer by her next friend,
H. J. Shaffer, Plaintiff in Error.

vs.

Robert Rose and P. J. Carey, Defendants in Error.
Mattie Hazel Moore Shaffer by her next friend,
H. J. Shaffer, Plaintiff in Error.

vs.

Charles Nogle, Defendant in Error.
Mattie Hazel Moore Shaffer by her next friend,
H. J. Shaffer, Plaintiff in Error.

vs.

Steve Tucker and Samuel Aiman, Defendants in Error.

Error to County Court of Champaign

Opinion by Thompson, P. J.

On May 18th, 1914, Mattie Hazel Moore Schaffer, a minor, by her next friend H. J. Shaffer, began a suit before a justice of the peace against Robert Rose and P. J. Carey. The summons was returnable the 23rd of May. It was served on May 19th, and on May 23rd, defendants not appearing, the evidence was heard by the justice and a judgment entered against the defendants for $25 and costs. An appeal to the county court was perfected by the defendants on the 10th of June.

On June 20th, 1914, Mattie Shaffer by her next friend began a suit before the same justice of the peace against Charles Nogle. This summons was returnable the 26th of June. The defendant was served with summons but did not appear before the justice on the return day. The case was heard on the return day and judgment entered againts the defendant for $5 and costs. The defendant perfected an appeal to the county court.

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On the 20th of June, 1914, Mattie Shaffer by her next friend also began a suit before the same justice against Samuel Aiman and Steve Tucker. This summons was returnable the 25th of June. The defendants were served with summons but did not appear before the justice. The case was heard on the return day and judgment entered against the defendants for $20 and costs. The defendants perfected an appeal from that judgment to the county court.

In the county court, by agreement of the parties, the three suits were consolidated and tried together. The court instructed a verdict in each suit for the defendants. The plaintiff prosecutes a writ of error to this court and by agreement the three cases are heard on the same record.

The evidence shows that plaintiff, who is fourteen

years of age owns two acres of land 237 feet in length north and south. The land owned by plaintiff was surrounded by a fence. There is a public highway along the north side of plaintiff's land. Plaintiff lived with H. J. Shaffer, who is her step father, on some adjoining land. He had sown her land to wheat in 1914. She was to get one half the wheat raised as rent. The fence on the south side of the road north of the wheat was a post and wire fence. The controversey appears, from statements of counsel, to have arisen over the question as to whether or not there is a roadway over the east side of plaintiff's land from the public highway on the north of it to some tracts of

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land south of plaintiff's land, but no evidence was offered concerning the claim of defendants.

The suit against Cary and Rose is to recover damages for removing two fence posts and tearing down about 60 feet of the east end of the fence on the north side of plaintiff's land and placing the fence so removed on plaintiff's land just south of the remaining fence.

The suit against Tucker and Aiman is for damages claimed because of the cutting two swaths of wheat or 29 sheaves, four or five days before it was ripe, on the east side of plaintiff's land and the carying away of the wheat after they were forbidden by plaintiff to go on her land.

The suit against Nogle is for damages for passing with an automobile several times over the land, from which the wheat had been cut.

Rose and Cary are highway commisioners. Aiman is the owner of land immediately south of the track owned by plaintiff. Nogle is the owner of land south of Aiman. Tucker is a tenant of Nogle.

The court directed a verdict for the defendants. Plaintiff's witnesses testified that Shaffer cut his wheat on plaintiff's land the second or third of July and that the wheat was cut by Tucker and Aiman four days before that time. The evidence is that Nogle drove over the land with the automobile after the wheat was cut. The evidence of plaintiff and her witnesses is that the fence was torn down by Rose and

(Page 3)

Carey about the middle of June.

Counsel for plaintiff in his argument contends that it was "about the first of July," when defendants Aiman and Tucker cut the wheat and that it was "sometime in the early part of June 1914, and before the maturity of

the wheat that the defendants Carey and Rose came upon the premises of the plaintiff and were in the act of tearing downpart of the fence," etc.

It is strange that plaintiff could forsee that the defendants contemplated certain acts and brought her suits against them before the justice of the peace before the acts had been committed. The record gives the dates upon when the suits were begun, the evidence in the county court fixes the times when the acts which caused the injuries were committed. The times fixed by all the witnesses are all subsequent to the respective trials before the justice of the peace. Parties however, ordinarily, can only be held responsible for acts of omission or of commission and not for acts in contemplation. The contention of defendants is fairly presented by their counsel, that the damages, to recover for which the suit is brought, were all done subsequent to the beginning of the suits. Counsel for paintiff does not either in his original argument or his reply make any explanation of the evident errors which must be either in the dates in the record or the dates fixed by the evidence of the witnesses.

(Page 4)

If the plaintiff could forsee that defendants were going to trespass on her land and do damage, she ought to be able to forsee that, if she brought suit before the damages had been done, the court would not sustain her actions if they were brought before the rights of action had accrued. The gift of prophecy would have foretold the result of the suit as well as the injury to be done.

The trial court could not do otherwise than direct a verdict for defendants in that state of the record. The judgments are affirmed.

Affirmed.

(Page 5)

the wife of that the defendant [illegible] on the premises of the plaintiff [illegible] tearing the house of the [illegible]

It is stated that [illegible]

Gen. No. 6596. **October Term, 1916.** **Ag No. 10**

Nordyke & Marmon Co., Defendant in Error

vs.

A. H. Drysdale, Plaintiff in Error.

Error to Macon.

Opinion by Thompson, P. J.

The Nordyke and Marmon Company brought suit against A. H. Drysdale before a justice of the peace. An appeal was taken from the judgment before the justice to the circuit court. The case was heard in the circuit court without a jury and judgment rendered for plaintiff for $131.80, to review that judgment defendant prosecutes this writ of error.

The defendant does no deny the claim of plaintiff that he is indebted to it for $131.80 for automobile parts shipped to him by plaintiff. The defendant filed a notice of set off in which he claims to have deposited $300 with the plaintiff and insists that plaintiff is indebted to him in the sum of $168.20, after deducting from the deposit the claim of plaintiff.

The plaintiff made a contract with the Illinois Motor Car Sales Company, hereinafter called the Sales Company, giving the Sales Company the exclusive right to sell Marmon automobiles in Macon and thirteen other counties in Illinois. The Sales Company agreed not to sell any other kind of automobiles and was to receive a commission of twenty-five per cent on each car sold. The Sales Company agreed to deposit with plaintiff

$65 for each car ordered. It gave an inital order for ten cars and deposited $650, the cars to be shipped only as subsequently directed. The plaintiff agreed to refer all prospective purchasers within the allotted territory to the Sales Company. After the Sales Company had secured its contract with the plaintiff, a contract very similar to the contract with plaintiff was made between the Sales Company and defendant under which the defendant secured from the Sales Company the exclusive right to sell Marmon cars in Macon county on a commission of twenty per cent. On each car sold the defendant was to deposit $75 with the Sales Company, and he gave an initial order for ten cars and deposited $750 with the Sales Company. The contract between the Sales Company and defendant was executed in triplicate and one copy was sent to plaintiff. The contracts show that the defendant was the agent of the Sales Company in selling cars, and the Sales Company

Gen. No. 6336. October Term, 1916. Ag No. 10

Nordyke & Marmon Co., Defendant in Error,

vs.

A. H. Dyrdale, Plaintiff in Error.

Error to Mason.

Opinion by Thompson, P. J.

The Nordyke and Marmon Company brought suit against A. H. Dyrdale [illegible] possession of the property. A appeal was taken from the judgment of the justice to the circuit court. The case was heard in the circuit court without a jury and judgment rendered for plaintiff for $[illegible] to reverse this judgment defendant prosecutes this writ of error.

The [illegible] the validity of [illegible] that he is [illegible] for [illegible] authorized to engage in the [illegible] business. The defendant is a [illegible] of [illegible] in the [illegible] the claim of plaintiff.

The [illegible] Nordyke and Marmon Co. [illegible] Sales Company, [illegible] the State Corporation [illegible] to sell [illegible] Company [illegible] to sell any other [illegible]

was not the agent of the plaintiff to receive the money deposited by defendant with the Sales Company. The contracts were separate and distinct and had no relation to each other. The contract between plaintiff and the Sales Company is a contract of sale of automobiles to the Sales Company for resale to the trade, at prices set forth in the catalogue current at the date of the order and according to the discount applying thereto. The prices are net free on board cars at Indianapolis. All orders for cars given by the Sales Company were to be accompanied by a deposit of $65 for each car ordered, but the contract does not appear to

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provide when the balance shall be paid. The evidence however shows that drafts accompanied the bill of lading which had to be paid before the cars were delivered. The contract between plaintiff and the Sales Company furhter provides: "It is further understood and agreed that such other goods, spare parts and replacements that may be required by second party, shall be shipped and invoiced by first party on its usual terms. * * * second party shall, at the time of execution of this agreement, give to first party a stock order in writing thereon, for enough motor cars to meet the estimated minimum requirement of second party's business during the current season and a similar order each season thereafter during the life of this agreement."

The contract between the Sales Company and the defendant contains the provision:— "The agent agrees to buy from the Dealer ten new Marmon cars of the following models and of the quantities indicated below. * * * The agent deposits with the dealer the following sum seven hundred and fifty dollars this being a deposit of seventy-five dollars on each car, it being mutually agreed that this deposit shall be held as a guarantee of good faith on the part of the agent and shall be applied on the purchase price of the Marmon cars in the following manner $75 on each car. * * * The agent agrees to pay the dealer on receipt of sight draft with bill of lading attached or on receipt of notice from the dealer that cars are ready for shipment at the works of the Nordyke and Marmon Company, the list price as above described less the discount hereinafter mentioned

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* * *. The dealer agrees to return such an amount of the deposit mentioned herein as may remain on hand over and above the net dis-

count mentioned above, at the termination of this contract upon the request of the agent." The Sales Company is the dealer mentioned in the contract.

The evidence also shows that defendant attempted to get plaintiff to make the sales to him direct:— that he preferred to do business with plaintiff direct rather with the Sales Compay:— but the plaintiff informed defendant that its relations with the Sales Company were satisfactory and it would not make the change defendant desired and all the cars sold by defendant were credited to the Sales Company. The Sales Company in making its contract with defendant did not profess to be acting on behalf of plaintiff but for itself.

In February, 1915, defendant wrote a letter to plaintiff to inquire of it, whether it had any collateral of the Sales Company that he could secure in order to force a settlement for deposits of his held by the Sales Company. The Sales Company in its agreement with defendant contracted in its own name, and did not pretend to be acting on behalf of the plaintiff as its prinicpal in entering into the contract with defendant and accepting the deposit. The defendant in the sale of cars was the agent of the Sales Company and not of plaintiff, and must look to the Sales Company for the return of his deposit. He therefore is not entitled to set off a deposit with the Sales Company against a bill for automobile parts sold to him by the plaintiff. There is no error in the case and the judgment is affirmed.

Affirmed.

7/16/17

2757

Gen. No. 6609 **October Term 1916** **Ag. 22.**

P. N. Jones, Appellee,

vs.

Granit Live Stock Ins. Co., Appellant.

Appeal from McLean

204 I.A. 553

Opinion by Thompson, P. J.

P. N. Jones paid $1500 to the Granite Live Stock Insurance Company for 10 shares of its capital stock. He began this suit to recover the sum paid for said stock and interest. The declaration consists of the common counts and a special count. The special count avers "that to induce the plaintiff to purchase and pay for the said stock the said defendant falsely represented that it was solvent, that its financial condition was sound and not impaired, and that the shares so purchased by plaintiff were fully paid and non-assessable and not then and there subject to an assessment," and that he relied thereon and that the defendant was insolvent, its capital stock was imparied and said shares were subject to assessment. Plaintiff also filed with his declaration, an affidavit stating that the suit was brought to recover money that affiant was induced through "false representations as set out in the second count of the declaration," to pay for ten shares of stock. The defendant filed a plea of the general issue. A jury returned a verdict for plaintiff for $1585.21; the defendant appeals.

The appellant was promoted and organized as a corporation in August 1913, with a capital of $100,000 by three men who had been operating a

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live stock insurance business. The promoters issued $50,000 of the capital stock to themselves for the good will of their former business. When the corporation was organized they sought to sell stock to the appellee. He investigated the company at that time and said "it was too badly mixed up for him to have anything to do with it." In July, 1914, the corporation was reorganized by removing two of the promoters from the office of director, and requiring the promoters to turn back into the treasury $35,000 of the stock taken to themselves for the good will of the partnership business. New officers and directors were put in charge of the business; one of the new directors was a Mr. Clark, a business partner of appellee. A man named Packard was employer by the corporation to sell stock at $150 per $100 share, of which he received $25 for his commission. He went with one Moots, a director, to see appellee to try to sell him stock. The first visit of Packard to appellee was in July. Appelee at that time told them "nothing doing

that thing has been too badly mixed up to have me do anything with it. They said it had been reorganized and was in good fix, and I afterwards talked to Mr. Clark and it seemed to be in a different condition." At a later date appellee said he could not tell for several weeks whether he would invest as he had other deals on hand. On October 2nd, Packard and Moots made the third or fourth visit to appellee when he agreed to take 10 shares of the stock. Appellee testified that he said he didn't

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know anything about the company and wanted to know if it was all right and they said, yes, there is no promotion stock, it is all right and sound financially, the parties that had been interested in it before were out, and it was all home fellows and named the directors, and appellee said he was acquainted with them and he believed it was all right from the class of men interested. Appellee testified that he had talked with his business associate Clark about the company before he agreed to take the stock. Packard who was a witness for appellee testified that he did not say that the company was sound financially and he is corroborated by Moots.

No witness testified that anything was said about the solvency of the company or that the stock was fully paid and non-assessable. The only evidence tending to prove the alleged false representation that the financial condition of the company was sound and unimparied, is the statement of appellee that Packard said "that its financial condition was sound," and that statement is denied by his own witness, Packard, and by the director Moots. The evidence given on the trial does not agree with or support the affidavit and special count of the declaration.

The statement of appellee when the company was organized that it was too badly mixed for him to have anything to do with it, with the repetition of this statement in July, his putting off making a subscription for several weeks; the fact that he talked about the company with

(Page 3)

a business partner, who was a director in connection with the statement that he was acquainted with the parties and "believed it was all right from the class of men interested in it" can lead to but one reasonable conclusion which is that he did not reply on the representations, which he alleges were made by Packard, a stranger to him, but that he invested after his own investigation.

There is no necessity for reviewing the legal question presented.

The judgment cannot be sustained on the evidence, and it is reversed with a finding of fact that the great preponderance of the evidence shows that the appellee did not buy the stock relying on the representations which he asserts were made to induce him to buy said stock. The judgment is therefore reversed.

Reversed.

There is no necessity for reviewing the legal question presented.

The judgment cannot be sustained on the evidence, and it is reversed with a finding of fact that the great preponderance of the evidence shows that the appellee did not buy the stock relying on the representations which he asserts were made to induce him to buy the stock. The judgment is therefore reversed.

Reversed.

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Gen. No. 6612. October Term 1916. Ag. No. 25.

Eulala McCormick, et al., Appellees,

vs.

J. H. Decker, et al., Appellants.

Appeal from Shelby.

Opinion by Thompson, P. J.

This is an action in case begun in May 1912, by Eulala McCormick, Lulu McCormick, and Nellie McCormick, minors, by their next friend, against J. H. Decker and others to recover damages for injury to their means of support under Section 9 of the Dram Shop Act.

The declaration avers in substance that beginning in May, 1902, down to February, 1910, certain of the defendants, who were dram shop keepers in premises owned by certain other defendants, with their knowledge and consent, sold and gave intoxicating liquors to the father of plaintiffs causing him to become habitually intoxicated and an habitual drunkard, and causing him to suffer from delirium tremens and die from the excessive use of intoxicating liquors on February 23, 1910. It is further averred that in consequence of such intoxication, the father of plaintiffs neglected his business, wasted his time, squandered his estate and money and plaintiffs were and have been deprived of their proper and necessary means of support.

On a trial a jury rendered a verdict in favor of plaintiffs for

(Page 1)

$1000 on which judgment was rendered. The defendants appeal. On a former appeal a judgment for $6000 was reversed by this court, and the cause remanded for errors of law. McCormick vs. Decker, 193 Ill. App. 451.

The evidence shows that William E. McCormick, the father of the appellees, used intoxicating liquors to such an extent that he had delirium tremens in 1906, and repeatedly thereafter until February, 1910, when he died at the age of 53 from the excessive use of such liquors. In his life time McCormick was a farmer who had inherited 400 acres of land. He was elected circuit clerk of Shelby county and then became addicated to the excessive use of liquors. At the time of his death he owned, subject to a mortgage of $5000, 280 acres of land. After his death all the land except 40 acres was sold to pay his debts.

The contention of appellants most strenuously insisted upon is that the trial court erred in not directing a verdict in favor of appellants, because after the home-

stead and dower had been set off there was sufficient estate left to maintain appellees in a manner suitable to their condition in life until they should arrive at the age of eighteen years, and for the further reason that appellants were not conducting dram shops and did not sell intoxicating liquor to McCormick, because there were no licensed saloons in Shelbyville subsequent to May 1908, until after the death of McCormick.

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There were no legally licensed saloons in Shelbyville after May, 1908, yet after Shelbyville had voted to become dry territory, an internal Revenue Stamp was issued to one of the defendants as a retail liquor dealer from September 1, 1908 to June 1, 1909, and the defendant dram shop keepers kept their places of business open and sold drinks of some kind to McCormick which caused him to become intoxicated. It is not necessary that the intoxicating liquor should be sold in a licensed saloon to render the seller of intoxicating liquor liable for damages under section 9, of the Dram Shop Act. The statute makes every seller of intoxicating liquor liable for all damages sustained to means of support in consequence of intoxication caused by such liquor, whether such sale was lawful of unlawful. There is ample evidence, which is not disputed, that the defendants sold liquor to McCormick after May, 1908, which caused him to become intoxicated to such an extent that he suffered from delirium tremens and died in consequence of the use of such liquors.

If the income of the father or his property that would have been applied to the support of his children was reduced and used in the purchase of intoxicating liquors which caused his intoxication, and injury to their means of support was thereby sustained, the question whether their means of support were suitable to their condition in life is immaterial. Jefferies vs. Alexander, 266 Ill. 49; McMahon vs. Sankey, 133 Ill. 636; Grove vs. Link, (opinion 3d Dist. yet unpublished.) If the appellees have sus-

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tained injury to their means of support in consequence of the intoxication of their father, they have a cause of action against the parties who sold him the intoxicating liquor, that caused his intoxication. There was no error in refusing the premptory instruction requested.

It is also contended that the court erred in admitting in evidence two statements of account between certain of the defendants and the deceased. The state-

ments are dated one in January 1907, the other in 1908, and are receipted by the defendants, who rendered them. They show the sale of liquors by drinks and by half pints or quarts at retail by certain appellants to the father of appellees. The accounts were rendered long subsequent to the time it is averred the defendants began selling liquor to McCormick. There was no error in the ruling of the court in admitting them.

It is argued that the first instruction given at the request of appellees is erroneous. It is in the language of the statute. The statute contains the words "for all damages sustained." These words must be construed with the prior words injured in their "means of support." The fourth instruction is concrete and concludes with the expression "the damages if any are confined to an injury to the means of support." The instructions are read as a series and the jury could not be misled by the first instruction. It is also the law that an instruction repeating verbatim the language of the statute on which a civil suit is based is not erroneous. Reich vs. The People, 229 Ill.. 574; Danley vs. Hubbard,

222 Ill . 88.

Counsel also criticise some other instructions given at the request of appellees but we are unable to find any error in any of them.

It is also insisted that the court erred in refusing two instructions requested by appellants. The instructions both direct a verdict. They both call atention to particular portions of the evidence, are misleading and argumentative, and the material legal propositions in the second refused instruction are contained in others given at the request of appellants. There was no error in their refusal.

We find no error in the record and the judgment will be affirmed.

Affirmed.

4/10 7)

2757

Gen. No. 6616. **October Term 1916.** **Ag. 28.**

Village of Brocton, Appellant.

vs.

J. L. Wiese, Jr., Walter R. Lutterell and Wallace Kaericker, Appellees.

Appeal from Edgar.

Opinion by Thompson, P. J.

This is a suit begun September 25, 1915, before a justice of the peace by the Village of Brocton against J. L. Wiese, Jr., Walter R. Lutterell and Wallace Kaericker to recover a penalty for the violation of a village ordinance. From the judgment before the justice an appeal was taken to the circuit court where on a trial a jury returned a verdict finding the defendants not guilty. A motion for a new trial was overruled and judgment rendered in favor of the defendants. The village prosecutes this appeal.

The appellant introduced in evidence an ordinance of the village, Section 57 of which provides:—"No person shall within the village limits, keep any billard table, pool table, bagatelle, pigeon hole or other tables of any kind used for similar purpose, or pin or ball alley to be used for profit or gain, without a license so to keep or use. Any person violating this section or any provision hereof shall be fined not less than one hundred nor more than two hundred dollars."

The evidence further shows that in the village of Brocton from August 1914, up to the time of filing the complaint, a pool or

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billiard room was run, under the management of some of the appellees. The room was in the business section of the village and was an ordinary room 70 to 80 feet in length and about 20 feet wide. It contained a billiard table, four pool tables with balls, racks and cues, chairs, a cash register, a cigar case and the equipment ordinarily used in public pool and billiard rooms.

Witnesses for the people testfied that they played pool and billiards and pald 5c for some pool games, 10c for others and 40c an hour for playing billiards; that they made the payments sometimes to Luttrell and at other times to Wiese and the money was put into the cash register. On cross examination it was developed, that a club,called the Brocton Amusement Club, was claimed to have been organized of which Wiese was the manager, Luttrell was the janitor and clerk, and Kaericher was the president. To bceome a member of the club all that a person did was to sign his name to a

paper and pay 25 cents for a ticket.

The manager or clerk of the club received the 25 cent ticket at 30 cents in payment for pool or billiards and after the 25 cent ticket was exhausted they simply paid in cash the ordinary prices of 5c or 10c for pool and 40c an hour for billiards. Wiese was refrered to by some of the witnesses as manager and by others as owner of the establishment. All the witnesses stated that they had no connection with the so called club. After the establishment of the so called club had been developed

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in the cross examination, counsel for appellant undertook to show that prior to August 1914, the defendants, or some of them, had conducted the room as a licensed pool and billiard hall in the same manner, except the requirement of buying a 30 cent ticket for 25 cents was not in vogue. To this offer hte court sustained an objection. The defence attempted to be made by the cross examination is that the defendants were only the agents of the so called club and it is not claimed that a license had been issued either to any of the defendants or to any other person or association.

While it was immaterial what the defendants did in the management of the pool room, when they had a license, if they had one, yet that the room was run in the same manner and with similar charges as a licensed pool room by the same parties or some of them, before the so called club was organized was material, to show that the club organization was only a shift or device on the part of the derendants to avoid the payment of a license fee. People vs. Gardt, 258 Ill. 468; Same Case, 175 Ill. App. 80. However without such proof, the device is so transparent and artificial, that it is almost incredible that a jury could be found that would return a verdct of not guilty after hearing the evidnece admitted. Rickart vs. The People, 79 Ill. 85; People vs. Gilmore, 273 Ill. 143; South Shore Country Club vs. The People, 228 Ill. 75; People vs. Craig,155 Ill. App. 73.

It is argued on behalf of appellees that the money paid for the

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games to Wiese or Luttrell was for the club. If that be true, still there is no agency in violating an ordinance. All persons who aid, abet or assist in the commission of an offense are guilty as principals as there can be no agency in the doing of an unlawful act . Pearce vs. Foote, 113 Ill. 228; Jamieson vs. Wallace, 167 Ill. 388; Auxer vs. Llewellyn, 142 Ill. App. 265.

If the business of the club was, without a license, in violation of an ordinance, then the agents of the club who knowingly assisted in violating the ordinance are guilty as principals. The court erred in not setting aside the verdict and granting a new trial.

It is also argued that the court erred in refusnig an instruction requested by the plaintiff. The abstract does not contain any instructions given at the plaintiff's request although the record shows that three were given. The refused instruction informed the jury "that one charged with a misdemeanor cannot avoid punishment by showing that all he did was done by him as the agent of another person or corporation and in this case although you may find from the evidence that the defendants or either of them only acted in the capacity of local manager or agent of the amusement company in question at the time of the alleged offence, yet if you further believe from the clear preponderance of the evidence that the said defendant or either of them were engaged in the unlawful keeping of a billiard room or pool room in violation of the ordinance in question, then whether he did it as manager or agent of such amusement company could make no difference, that when one is charged with a

crime he cannot escape the penalty by claiming that all he did was done as the agent or manager of another person or corporation."

The instruction states the legal proposition involved correctly but in rather an argumentative form. It should be made applicable to the case and the argument omitted.

It is contended that three instructions given at the request of the defendants are erroneous. The only objection to them is that they do not tell the jury that a verdict might be rendeered finding some of the defendants guilty and other not guilty, that the inference to be drawn from the defendant's instructions is that all the defendants must be found guilty jointly or all not guilty. The first instruction given for the appellant told the jury that it might find against the defendants or one or more of them. The instructions of appelees if read alone are misleading but when read as a series with appellants instructions, the jury could not fail to understand that they might find some appellees guilty and others not guilty as the evidence might justify.

The appellant tried the case on the theory that the fine, if any, assessed against the defendants should be a

several fine against each as appears from the form for a verdict requested by them, that if the jury find for the plaintiff the form of the verdict may be, "we the jury find the issues for the plaintiff and against the defendants and assess the plaintiff's damages at the sum of ..... Dollars each (here inserting

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the amount of not less than $100 nor more than $200 for each defendant as you may from the evidence determine.") If this instruction had been given and the jury had found the defendants guilty the combined fines in this suit could not have been less than $300 or an amount beyond the jurisdiction of a justice. This is not a suit against them severally but jointly, and like any other tort they could find against any one, two, or all three of the defendants or in favor of any one or more of the defendants as the evidence justified. It would have been error to render judgment for a sum against each defendant severally, but it must be a judgment against such defendants, if any, as were found guilty jointly. Jacksonville vs. Holland, 19 Ill. 271; Indiana Millers Mutual Fire Insurance Co. vs. People, 170 Ill. 474; 65 Ill. App. 355. The court did not err in refusing the instruction as to the form of verdict requested by appellant and the instruction given by the court on its own motion was proper.

The judgment is reversed and the cause remanded because the judgment is against the clear preponderance of the evidence.

Reversed and Remanded.

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several fire against each as appears from the form for a verdict recorded by them, that if the jury find for the plaintiff the form of the verdict may be "We the jury find the issues for the plaintiff and against the defendants and assess the plaintiff's damages at the sum of ..... Dollars each three hundred."

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[illegible]

or not less than [illegible] than $50 for each defendant as you may find the evidence determines." If this instruction had been given and the jury had treated the defendants collectively the verdict in this suit could not have been less than $300 or an amount beyond the jurisdiction of a justice. This is not a suit against three severally but jointly, and the only other tort they could legally commit is two, or all three or the defendants [illegible] or more of the defendants as the evidence justifies. It would have been error to render judgment [illegible] defendant severally, but it must be a joint [illegible] such defendants, if any, are found [illegible]. Jackson vs. Hill, [illegible] Mutual Fire Insurance Co. vs. Foster, [illegible] Ala. 588. "The [illegible] attention is to the form of verdict [illegible] and the [illegible] the court in [illegible] motion was proper.

The judgment [illegible] the [illegible] because the [illegible] of the evidence.

Reversed and Remanded.

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4/16/17

(3737)

Gen. No. 6619. October Term, 1916. Ag. No. 31.

W. H. Cline, Appellant.

vs.

City of LeRoy, Appellee.

Appeal from County Court McLean County.

204 I.A. 558

Opinion by Thompson, P. J.

This is a suit brought by appellant against appellee to recover under section 256 of the Criminal Code, three fourth of the damages to property averred to have been injured or destroyed by a mob on the 19th of October, 1914. The declaration contains two counts, each of which make the averment necessary to recover under the statute. Appellant presented an itemized account of the damages claimed to have been sustained, some of which are, paint on house $20, glass broken $8.25, two cherry trees cut $5, appel tree cut $25, water wasted $1.75, with other items amounting to $126.

The jury returned a verdict for the appellee on which judgment was rendered. The only serious contention of appellant is that the verdict and judgment are against the manifest weight of the evidence and a new trial should have been granted.

The evidence shows that appellant, who was about the age of 70 years, owned and occupied a residence in the City of LeRoy. He had recently celebrated his second marriage. On Monday evening, the 18th of October, while appellant and his wife were atending a church service, a crowd of some 70 people assembled about his residence. The appellant and his

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wife seeing the crowd assembling did not go home but went to a neighbor's house. The crowd then went to the neighbors house but upon being requested by the neighbor to go home, it quietly dispersed. The appellant appears at that time "to have set up the cigars to the boys."

The next evening about 7:30 a large crowd, estimated at from 150 to 300 persons, congregated about appellant's residence. The crowd made various kinds of noises, such as shouting, pounding on the house, hammering on circular saws hung on trees in the yard and firing guns. It also built a fire in the street with lumber taken from appellant's lot and burned his lawn mower. Bricks are said to have been thrown through the windows and an old pump was broken and thrown into a dry well. A garden hose was attached to a city water faucet and water thrown over and about the house and mud was plastered on the porch.

Gen. No. 6812. October Term, 1916. 4 A. No. 31.

W. H. Lyon, Appellant.

vs.

City of Lake, Appellee.

Appeal from County Court
Macoupin County.

Opinion by Thompson, J.

This is an action of trespass, brought by appellee against appellant in the County Court of Macoupin County, to recover the sum of $50 for a violation of the ordinance of said city, by the defendant, on the 3d day of December, 1915. The declaration contains two counts, one for the violation of the ordinance of said city, and the second for the violation of the statute of the State of Illinois, in the same matter. The defendant pleaded the general issue, and a jury was waived and the cause was tried by the court, which found the defendant guilty and assessed a fine against him in the sum of $50, and judgment was rendered against him for the same and costs.

The ordinance of the city of Lake provides, in substance, that no person shall operate a motor vehicle upon the streets of said city at a rate of speed exceeding 15 miles per hour, and that the operation of such vehicle at a greater speed than 15 miles per hour shall be prima facie evidence of a violation of the ordinance.

The evidence in the case shows that appellant was operating a motor vehicle upon the streets of said city at a rate of speed exceeding 15 miles per hour, and that the operation of such vehicle at a greater speed than 15 miles per hour shall be prima facie evidence of a violation of the ordinance.

The appellant has very much exaggerated his damages. He testified first that he paid $18.25 or $18.50 for replacing broken glass, on cross examination he reduced the mount to $8.25. His claim for repairing the damage to the paint was $20. He paid the painter $3. For damage to the apple tree his claim is $25, the evidence shows a limb was cut off which did little damage. The damage to the cherry trees he fixed at $5, all the damage done was a little scratching on the bark by the teeth of the saws being knocked against the trees. Concerning his claim of $1.75 for water wasted, the evidence shows that for the three

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months, which covered October 19th, appellant's water bill was $1, being the minimum charge while the price for the water actually used during that three months was only 65 cents. The appellant so exaggerated his damages that the jury did not believe anything testified to by him.

The proof, however by other witnesses as well as by appellant, is that he tried to telephone to the city marshall, and not being able to get him, he told the manager of the telephone what was going on, and asked him to tell the city marshall that "they were tearing up everything." The city, which has a population of about 1500, only has one police officer on night duty and he is known as the city marshall or night watchman. The city marshall was attracted to appellant's residence about 8:30 by the noise; he testified that he went there at that time and found about 300 people there, hollering in the yard and about the house, etc., and that he stayed around for some time; that he told them to leave and part of them did go away. The marshall only stayed a short time and then went away leaving the charivari party in action; he went back again about ten thirty o'clock. He knew that appellant had been trying to telephone to him. The city mayor was informed that evening by his children that they were going to a charivari party. The mayor took no steps to stop the riotous preformance. The appellant fired a small 22 rifle several times into the ground or over the trees trying to scare the crowd, but the crowd had a band engaged who played "silver threads among the gold." The evidence also shows that some of the

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crowd had a gun or guns which were fired off. The appellant was in his house with his wife in a closet in terror.

"The charivari party consisting of the crowds in

front of and upon the defendant's (appellant's) premises constitute an unlawful assembly; and by their transactions, conduct and behavior became what is known in law as a 'riot' tending to the disturbance of the peace and the annoyance, if not the terror, of the defendant and others in the vicinity." Higgins vs. Monaghan, 78 Wis. 602. "Every good law-abiding citizen must and does condemn such unlawful and riotous assemblies (charivaris). They are wholly indefensible in law and morals, and are reprobated by every well-disposed person." Gilmore vs. Fuller, 198 Ill. 130.

The preponderance of the evidence shows that the appellee used all reasonable dilligence on his part to prevent damage to his property. He notified the marshall, who already knew of the riotous proceeding, and the city officials did nothing to protect appellant's property from damage after they were advised of the charivari or riot. Appellant threatened the crowd and told them he was trying to get the city marshall and parties in the crowd said the marshall and mayor were behind them. The marshall, who was notified by the telephone manager that appellant wanted him, said that he supposed appellant wanted him to get the crowd away. Some damage was done by the riotous crowd to

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appellant's property. The verdict and judgment are against the manifest weight of the evidence and the court erred in not granting a new trial.

Appellant also contends that the trial court should have instructed a verdict for him. The defence urged is that appellant did not "use reasonable diligence" to prevent the damage. There is some evidence tending to support that contention. Where there is evidence tending to support the contention of both parties the trial court cannot instruct a verdict. Libby McNeil & Libby vs Cook, 222 Ill. 206; Eblin vs. American Car Co., 238 Ill. 176; Brophy vs. Illinois Steel Co., 242 Ill. 55; Bushway, 242 Ill. 441.

The judgment is reversed and the cause remanded for the reasons indicated.

Reversed and Remanded.

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Gen. No. 6626. October Term, 1916. Ag. No. 37.

Harriet R. Miskell, Appellee,

vs.

John Murray, Appellant.

Appeal from Vermilion

Opinion by Thompson, P. J.

This is an action seeking to recover damages for an alleged breach of promise of marriage. The defendant filed pleas of the general issue and special pleas averring that at the time of the alleged promises, the defendant was a married man and that plaintiff had knowledge of that fact. A jury returned a verdict for $2500.00 in favor of plaintiff, on which judgment was rendered.

The undisputed facts are that the plaintiff had been married twice before. She secured a divorce from her last husband in 1910, in Texas, where she had resided about two years. She had lived in Danville 32 years and had known the defendant 14 years. Their relations had been very friendly. In the early part of 1911, she lived in and ran a house of prostitution, on Main Street, in the city of Danville. In the spring of 1911, she moved to 24½ Washington Avenue, where she ran a house of prostitution over a saloon run by the defendant. The defendant had been divorced from his wife, Ellen Murray, but had been remarried to her in the fall of 1910. The plaintiff and the wife of defendant were so intimate that they corresponded with each other when plaintiff lived in Texas. The wife of defendant died December 13, 1915. This suit was begun in January, 1916, over three years after the alleged making of the promises to marry. In 1911, plaintiff and a woman named Gertrude Reed were indicted in the Federal Court of Danville, and in December 1911, the women were convicted and sentenced to the Federal Prison at Lansing, Kansas, where plaintiff remained in prison until the last of December 1912. The evidence introduced, tending to prove a promise of marriage, is that of the plaintiff and Mrs. Simpson, a sister-in-law of plain-

tiff, with 71 letters written to plaintiff for the defendant by one, W. B. Reed. Plaintiff testified that defendant promised to marry her in 1911, just before she moved over his saloon and while she was in the county jail and that the promises in the jail were in the presence of several parties who could have heard them. Mrs. Simpson, in her evidence in chief only testified that defendant came to her house while plaintiff was in prison at Lan-

sing to get her to buy some things for plaintiff and he said he was going to make her happy. She did not mention the question of marriage in her examination in chief, but in her cross-examination she said plaintiff said, when she came home, he intended to marry her and make her happy. The letters were written by Reed, who testified that "he framed the sentiment and the literary excellence." When writing one of the letters Reed asked defendant "Jack did you make her any promise before she went away?" and defendant replied, "You know I am married don't you?" None of the letters contain any reference to a possible marriage between the parties but the contents are such as might be expected between parties with the record of the parties to this suit. There is neither any evidence showing that mutual promises were made by these parties not that she accepted his promise.

When the plaintiff moved over the saloon of defendant in 1911, she desired to buy the furniture in the rooms. It was owned by the wife of the defendant and she would not sell it to plaintiff. The defendant got another woman to go and buy the property from defendant's wife for her. The proof also shows that the wife of defendant was running a hotel in Danville, where defendant ate with his family and slept during 1911, and the plaintiff was there frequently at meal times and saw the association of defendant with his wife, during the time the promises are alleged to have been made except while plaintiff was in prison.

The defendant denied ever having made to plaintiff any promise of marriage. Eight witnesses, who are disinterested, testify to

various statements of the plaintiff that she knew defendant had remarried his former wife. All the witnesses, who plaintiff named as having heard the promises of marriage, denied having heard any conversation about marriage between the parties.

Without further reviewing the evidence, the preponderance appears to be that no promise of marriage was made between these parties and the evidence shows by a clear preponderance, and even beyond a reasonable doubt, that the plaintiff had knowledge during all the time within which she states the promises were made, that the defendant was a married man living with his wife.

A contract of marriage between parties, one of

whom is married to another party, and known to be so by the parties, is unlawful and cannot be recognized in a court of justice. Paddock vs. Robinson, 63 Ill. 99; R. C. L. Sec 4, page 145. It is unnecessary to review the other questions argued. The judgment is reversed with a finding of fact, that plaintiff at the time the alleged promises (if any) were made, knew that the defendant was a married man living with his wife.

Reversed.

Gen. No. 6632 October Term, 1916. Ag. No. 43

Mrs. Horace A. Smith, Appellee,

vs.

St. Paul Fire and Marine Insurance Company, Appellant

Appeal from Edgar

Opinion by Thompson, P. J.

The appellee, in an action of assumpsit brought to recover on a fire insurance policy issued by appellant company, on a trial before the court without a jury, recovered a judgment for $612.50.

The declaration pleads the policy and the destruction by fire on December 4, 1915, of the property insured without any fault on the part of appellee; that appellee on December 4, 1915, gave notice to appellant of the loss and has performed all acts required by the policy to be done by her, etc. The appellant pleads (1) the general issue; (2) that appellee willfully caused the building to be burned and (3) that appellee neglected and refused to give appellant any notice of the loss or itemized statement of it. Replications were filed to all the pleas. The replication to the third plea avers that notice was given to one R. K. McCord, a duly authorized general agent of appellant, and that appellant sent its adjuster, one J. M. Allen, to investigate said loss and that said adjuster continued to make attempts to adjust the loss with appellee until after the time fixed by the policy for filing such notice and proofs had expired, and prevented appellant from filing the same and thereby waived the filing of proofs, etc.

The only defence sought to be made is that appellee did not give immediate notice in writing to the appellant of the loss, and did not within sixty days after the fire render a sworn statement to appellant stating her knowledge and belief as to the origin of the fire, and her interest in the property with proofs of loss.

The policy was issued by one R. K. McCord, an agent of appellant, of Paris, Illinois, and is countersigned by him. The building destroyed was situated in the village of Isabel. It was a

frame building, owned by appellee. Part of it was occupied by her as a grocery and restaurant; the remaining part was occupied by John Slater as a meat market. The fire occured in the early morning of December 4, 1915 Appellee, by telephone, immed-

iately notified R. K. McCord, the agent who had written the policy, of the fire. McCord testified that he was an authorized agent of appellant, and that appellee called him by telephone the morning of the fire and said her building had burned, and wanted him to come over; he replied he did not do the adjusting for the company but would report it, and that he did; that pursuant to notice given by him, he got a letter from J. M. Allen of Decatur, an adjuster for appellant, asking him to meet Allen at Isabel to adjust this loss, and they met there on December 20, 1915, and went to the home of appellee, took measurements of the foundation, made figures and discussed the loss with her. Allen presented to appellee at that time, a "non waiver agreement" and got her to sign it. Appellant on the trial produced this agreement, which is signed by appellee and by the "St. Paul Fire and Marine Ins. Co., J. M. Allen St. A." The appellant introduced this agreement in evidence and that was the only evidence introduced by it. Appellee also introduced in evidence two letters written by Jay M. Allen to McCord in reference to appellee's loss. One is dated December 18, 1915, in which he refers to a letter of the 15 th of December, from McCord to him, about the Isabel loss, and in which Allen states that his wife has been critically ill for ten days "but you can rest assured that I will visit you shortly and get this loss settled up in some manner or other so as to get this out of our system." Another dated January 25, states that he will arrange to visit McCord within the next ten days and hopes to close up the Isabel loss. These letters are signed by Allen as Special Agent, and are upon letter heads purporting to be those of appellant. Letters from McCord to appellee were also offered in evidence stating that appellant was a good company and he would take up the matter of the loss with it immediately. The last is dated

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February 21, and in it is the statement that he has a letter from Jay M. Allen, who has been unable to leave home on account of sickness, but he assures the writer he will come just as soon as he can. There was proof also showing that there were subsequent communications between the local agent and appellee as to when the adjuster was coming.

There was also proof that appellee had had a loss by

fire about a year prior to this one, which had been covered by a policy issued by appellant and that Jay M. Allen had acted as the adjuster for appellant and had settled with appellee for that loss.

The non waiver agreement states that "it is to preserve the rights of all parties hereto, and provide for an investigation of the fire and the determination of the amount of the loss or damage, in order that the party of the first part may not be delayed unnecessarily in her business and in order that the amount of her loss and damage may be ascertained and determined without regard to the liability of the second part."

There is no assignment of error raising any question as to the evidence admitted.

The "non waiver agreement" produced by appellant and signed by it by Jay M. Allen, State Agent, is sufficient proof of the fact that Allen was the authorized adjuster of the company, even if there had not been other proof on that question. If he was an adjuster authorized to take a non waiver agreement, which appellant has adopted as its act, it cannot well repudiate his other acts in the line of an adjustment.

The non waiver agreement showed the agency of Allen to adjust the loss and the appellant is bound by the acts of such agent within the scope of his authority and notice to him was notice to the company. (Phoenix Ins. Co. vs. Stocks, 149 Ill. 319.) The acts and representations of the agent of appellant with respect to matters in his charge were the acts of the appellant. His acts were incon-

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sistent with an intention on the part of appellant to insist upon a strict observance of the conditions of the policy in regard to notice in writing of the loss, and the presentation of the proofs of loss within the time specified. Where an insurance company sends an agent to adjust a loss it is estopped to subsequently deny that it had proper notice of the loss. Home Ins. Co. vs. Myer, 93 Ill. 271. Appellant cannot be premitted to escape liability by the representation of the adjuster to the insured, that his wife was ill and he would come shortly and get this loss settled upin some manner, and thereby mislead the insured until the time for making proofs had elapsed. (Citizens Ins. Co. vs. Stoddard, 197 Ill. 330; Dwelling House Ins. Co. vs. Dowdall, 159 Ill. 179; Phoenix Ins Co. vs. Grove, 215 Ill. 299.)

The evidence fully sustains the judgment and it is affirmed.

Affirmed.

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fire about a year prior to this one, which had been covered by a policy issued by appellant and that Jay M. Allen had acted as the adjuster for appellant and had settled with appellee for that loss.

The non-waiver agreement states that "it is to preserve the rights of all parties hereto, and provide for an investigation of the fire and the determination of the amount of the loss or damage, in order that the party of the first part may not be delayed unnecessarily in her business and in order that the amount of her loss and damage may be ascertained and determined without regard to the liability of the second part."

There is no assertion of error raising any question as to the [illegible]

The "non-waiver agreement" produced by appellant and signed by Jay M. Allen [illegible] is sufficient proof of the fact that Allen was [illegible] adjuster of the company, even if there had not been other proof on that question. [illegible]

[illegible]

The [illegible] 170 [illegible]

The evidence [illegible] stained.

Gen. No. 6639. October Term, 1916. Ag. No. 49

Mary M. D. Cory, Appellant,

vs.

Charles W. Pullen, et al., Appellees.

Appeal from Montgomery.

Opinion by Thompson, P. J.

This is a suit begun by Mary M. D. Cory to foreclose a mortgage. The bill alleges that on February 12, 1910, Charles W. Pullen and Stella Tratt Pullen, his wife, executed a note payable to the order of Henry R. Crawford for four thousand dollars due five years after date with interest at the rate of six per cent per annum payable annually as evidenced by coupon notes, which said notes were a few days after they were executed, purchased by complainant and assigned to her by Crawford, and that she has been the owner in exclusive possession of them ever since such assignment; that on February 12, 1910, the said Pullens executed a mortgage on three described parcels of real estate containing 100 acres in Montgomery county, which was duly recorded on February 16, 1910; that said four thousand dollars with interest from February 12, 1915, is now due complainant; that on December 15, 1911, while said note and mortgage were in the possession of complainant, Henry R. Crawford wrongfully and fraudlently, without the knowledge of complainant executed a release of said mortgage and caused the same to be recorded and to conceal his fraudulent acts paid to complainant the interest coupons as they became due; that said pretended release is a cloud on complainant's title. The bill alleges that Charles O. Swart, George A Neisler, W. E. Morain and James M. McGee have or claim some interest in said mortgaged premises or part thereof as purchaser, mortgagers or judgment creditors, which interest ,if any, is subject to the mortgage of complainant.

The prayer of the bill is that an account be taken, and that Charles W. Pullen, Stella Tratt Pullen and Henry R. Crawford be decreed to pay complainant the sum found to be due, and in default of

payment that the mortgaged premises be sold and that all persons claiming under them be foreclosed; that the said release be declared void and that complainant have execution against Charles W. Pullen, Stella Tratt Pullen and Henry R. Crawford for any balance remaining due complainant, and for general relief. It makes Charles W. Pul-

Swart, George A. Neisler, W. E. Morain and James M. McGee parties defendant.

Answers were filed by the defendants Neisler, Morain, Charles W. Pullen and Stella Tratt Pullen. Charles W .Pullen and Stella Tratt Pullen also filed a cross bill praying that should a decree be entered on the original bill, then that Swart be decreed to be the principal debtor. The cross bill is however shown by the decree to have been withdrawn. Swart, McGee and Crawford were served with summons but did not answer, and the record does not show that any order of default was entered against any of them.

J. W. Bechtold, also by leave of court, intervened and filed an answer in the nature of a cross bill, denying any right of complainant in the original bill to a foreclosure and setting up his rights under two notes for $1,000 each and a mortgage made by Neislers to W. E. Morain on ninety acres of the premises described in the Crawford mortgage.

The evidence was heard in open court and a decree entered dismissing the original bill. The complainant appeals.

The following facts are shown by the record. On February 12, 1910, Charles W. Pullen was the owner of certain real estate in Montgomery county. On that day he and his wife, Stella Tratt Pullen, executed a note for the principal sum of $4,000 payable to the order of Henry R. Crawford at his office in Hillsboro, in New York exchange, five years after date, with interest at the rate of six per cent per annum payable annually as per coupon interest notes attached. A mortgage on an eighty acre tract and two ten acre tracts of land owned by Pullen was also made by Pullen and his wife

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to Henry R. Crawford securing the payment of said notes, the mortgage, however, does not state where the notes are payable. There is no provision for the payment of the principal note before the time of its maturity. The mortgage was duly recorded on February 16, 1910. On March 17, 1910, appellant bought the notes from Crawford, and he endorsed the principal note and delivered the notes and mortgage securing them to her. Since that time, she has been the owner and had exclusive possession of the principal note and the mortgage securing it. No written assignment of the mortgage was made. Each year when the interest became due appellant took the note with the attached coupons to

Stuart. George A. Nowlin, W. E. Marvin and James M. McGee parties defendant.

Answers were filed by the defendants Nowlin, Marvin, Charles H. Baker and Stella Trott Patton. Charles M. Baker and Stella Trott Patton also filed [illegible]

[illegible]

[illegible]

Crawford's office, received a check from him for the interest due, clipped off the interest coupon due and delivered it to him. When the last coupon note matured, appellant took the principal note with the interest coupon to Crawford's office and collected the interest but nothing was said about the payment of the principal.

On September 19, 1910, the Pullens sold and conveyed the real estate that was covered by the Crawford mortgage to C. O. Swart, subject, however, to the $4000, mortgage and to a second mortgage of $1000, with the interest accrued on them, and the taxes assessed in 1910, all of which the grantee assumed.

In the fall of 1911, George A. Neisler, desiring to buy the eighty acre tract and one of the ten acre tracts of land mortgaged by the Pullens to Crawford, asked W. E. Morain, a dealer in real estate, who lived at Irving a village about eight miles northeast of Hillsboro, near the land in question, what would buy 90 acres of the Swart land. Swart lived at Decatur. Morain entered into correspondence with him for the purchase of the land for Neisler, which resulted in Swart agreeing to sell and convey to Neisler the eighty acre tract and one ten acre tract for $5000 free and clear of all incumbrances, except some mineral rights reserved in the

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Pullen mortgage and deed. Swart furnished Morain with abstracts which showed a satisfactory title, subject to the $4000 mortgage to Crawford and a second mortgage for $1000 to John Tratt, and Morain so advised Neisler by letter. It was arranged by correspondence that the parties should meet in Hillsboro, on December 15, 1911, to close the deal. On the day they were to meet, Swart got to Hillsboro first and went to Crawford's office and procured from him a release of the Pullen mortgage. The release is executed by Crawford and purports, in consideration of $1.00 and other good consideration, to release all interest in the land covered by that mortgage. Morain was passing along the street, and Swart, coming out of Crawford's office, called to Morain that he had the deed and releases for the two mortgages and showed them to him. They stepped into the front of Crawford's office and Morain wrote and delivered to Swart a check for $4,889.34, and Swart delivered the two releases and the deed to Neisler. Morain had the releases and the deed to Neisler recorded. The deed to Neisler conveys to him the 80 acre tract and one of the ten acre tracts. It is dated December 12, 1911, was acknowledged December

14, 1911, and was recorded December 15, 1911. The release by Crawford is dated and acknowledged December 15, 1911, and was recorded at the same time as the deed to Neisler. Morain had no conversation whatever with Crawford, and Neisler testified that all he did in the purchase of the land was done through Morain and that he was not in Crawford's office.

Swart testified that he procured the release from Crawford and that Crawford talked like he owned the mortgage, and required him to pay interest up to the next interest paying time, but said if he succeeded in loaning the money before that time he would refund the interest saved.

Neisler and his wife executed a mortgage to Morain covering the real estate that he had bought from Swart. The mortgage is

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dated December 12, 1911, was acknowledged December 13, and recorded with the Neisler deed. It was made to secure a principal note for $3000, payable to the order of Morain five years after date. This mortgage was made after the sale to Neisler had been agreed upon and was to be effective, if the deal should be closed and was for part of the purchase money that was loaned to Neisler by Morain.

On December 13, 1912, the Neisler note with the mortgage recorded December 15, 1911, was taken up and a new mortgage, securing three principal notes each for $1000 payable to the order of Morain five years after date, with coupon interest notes attached, was executed to take the place of the first mortgage. This change was made to accomodate Morain so that he could more readily put the notes on the market. One of these notes had been paid, the other two were transferred by endorsement for value to J. W. Bechtold on March 11, 1915.

Henry R. Crawford was not authorized by appellant either to receive payment of the $4000 note, which he had endorsed to her, or to release the mortgage securing it. She did not learn until about Christmas, 1915, that a release had been executed. On learning that fact, she immediately began this suit.

The only question presented and argued in this cause is whether the release executed by Henry R. Crawford of the mortgage given to him by Charles W. Pullen and his wife is void as to the Pullens, George A. Neisler, the present owner of part of the land covered by the mortgage to Crawford and J. W. Bechtold the

present owner of the notes and mortgage given by Neisler to Morain and by him assigned to Bechtold.

The case is the outgrowth of a fraudulent transaction of Henry R. Crawford and must result in a loss to innocent parties unless the note can be collected from Crawford. It is contended on behalf of appellant that Swart, Neisler and Morain, his agent, were negligent in not demanding that they be shown the Pullen note and mortgage,

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when the release executed by Crawford was delivered to them by Swart. Neither Swart, Neisler or Morain had any knowledge or notice that Crawford held transferred the note made by the Pullens. Abstracts of the records were required to be furnished, when Swart bought the land from Pullen and when Neisler bought from Swart. Swart bought the land from Pullen, subject to the payment of the Crawford note and mortgage, and agreed to sell it disencumbered of all mortgages. Neisler received a deed from Swart with a release of the mortgage to Crawford against the property duly executed. Crawford was the only party lawfully authorized to execute the release so far as appeared from the records. Neither Neisler or Morain had any talk with Crawford, nor had either of them any occasion to make any enquiry concerning the right of Crawford to make the release. He was the mortgagee and the payee named in the note. He, so far as anything appeared on the record, had the right to receive payment of the note before its maturity and release the mortgage, whenever the mortgagor or his grantee should pay his demand therefor. There is nothing appearing in the evidence which would excite in the minds of Neisler or Morain the least suspicion of the rascality of Crawford or that the transaction was not straight. Neither Neisler nor Morain were in any way negligent, while appellant was negligent.

The law is well settled in this state that the trustee, in a trust deed of the character of the one in question, has the power as to third parties to release the lien created thereby so as to reinvest the title in the grantor, even though he does so without the consent of the holder of the indebtedness which the trust deed was given to secure, and in violation of the obligations of the trust. (Mann vs. Jummel, 183 Ill. 523,) and such release may be made even though the indebtedness secured by the trust deed is not due at the time the release is executed. (Ogle vs. Turpin, 102 Ill. 148.)" Vogel vs. Troy,

232 Ill. 481; Williams vs. Jackson, 107 Us. 478.

"Public records of conveyances and instruments affecting the title to real estate are established by statute to furnish evidence of such title, and a purchaser may rely upon such records in security,

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unless he has notice or is chargeable with notice of some title, claim or conveyance inconsistent therewith." "In the absence of any notice or ground of suspicion it is not the duty of a purchaser to obtain an admission of payment from the holder of a note secured by a trust deed regularly released of record." Lennartz vs. Quilty, 191 Ill. 174; Ogle vs. Turpin, (Supra;) Mann vs. Jummel, (Supra.)

A mortgage securing the payment of a note is but an incident to the debt. Whatever is sufficient to transfer the title to the debt will also transfer the mortgage in equity, and the mortgagee will hold the title for the assignee of the debt. "A mortgage is as effectually assigned by a transfer of the mortgage indebtedness without any indorsement upon the mortgage as with it. Fountain vs. Bookstaver, 141 Ill. 467. An assignment of a mortgage does not convey or transfer the legal ownership, the right acquired by an assignment is only an equitable one. Sanford vs. Kane, 133 Ill. 199. Bartholf vs. Bensley, 234 Ill. 336.

One purchasing notes and a trust deed securing them must give notice to the grantor if he desires to preserve his rights under the trust deed against payments made to the former holder. Napieralski vs. Simon, 198 Ill. 384.

The asignee of a note is at fault in failing to give notice of the assignment of the note to him. "The equitable asignee to protect his rights against a payment by the mortgagor to the mortgagee must give the former notice, actual or constructive, of its assignment, and failing to do so is negligence." Towner vs. McClelland 110, Ill. 551; Napieralski vs. Simon, (Supra;) Gemkow vs. Link, 225 Ill. 21; Edgerton vs. Young, 43 Ill. 464.

The appellees, Pullen, in making the conveyance to Swart were guilty of no negligence in conveying the real estate subject to the payment of the encumbrance. Swart by accepting such deed assumed the payment of the mortgage debt. He by his assumption of the mortgage debt, became the principal debtor and Pullens were only sureties.

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(Schultz vs. Sroelowitz, 191 Ill. 249, at

page 255.) The property became the primary fund for the payment of the debt. (Drury vs. Holden, 121 Ill. 130; Schultz vs. Sroelowitz, (Supra.) Neisler was not guilty of any negligence in accepting the deed with the release from Crawford, the mortgagee; neither was Bechtold in any condition different from Neisler.

If appellant had taken an assignment of the mortgage and had it recorded, she would thereby have given notice that would be binding upon all parties, who might subsequently become interested in the property, and any rights that they might acquire would be subject to the rights of appellant. "To be protected the assignee must omit no duty nor fail to exercise every precaution which prudence demands of all men acting in reference to matters of moment." (Buehler vs. McCormick, 169 Ill. 269; Walker vs. Demart, 42 Ill., 272.) Appellant was negligent in not taking and having recorded an assignment of the mortgage. The property was sold for more than sufficient to pay the note held by appellant so that she can have no claim against the original mortgagors. The equities of the Pullens, Neisler, Morian and Bechtold are superior to those of appellant, and there was no error in the decree in dismissing the bill as to such defendants, and refusing to set aside the release as to the land conveyed to Neisler.

As to Swart a different rule appears to apply. "The rule requiring the assignee of a mortgage securing notes endorsed in blank to give notice, actual or constructive, in order to protect himself against payments by the mortgagor to the mortgagee does not extend to subsequent purchasers of the property, who assume and agree to pay the encumbrance, and notwithstanding the assignee has not recorded the assignment or given notice thereof to anyone, he is entitled to protection against payments made by the purchasers to the mortgagee in the belief that he still owned the indebtedness." Schultz vs. Sroelowitz (Supra;) Stiger vs.

Bent, 111 Ill. 328; Lennartz vs. Quilty, (Supra;) Kenahane vs. Smith, 97, Ill. 156; Fortune vs. Stockton, 182 Ill. 454. Appellee, McGree does not appear from the record to have had or to claim any interest in the property in litigation and the bill does not contain any allegations under which a judgment for a deficiency can be rendered against Swart.

The court erred in not setting aside the release as to the ten acres the title to which still appears to be in Swart. The decree is affirmed as to so much of it as

dismisses the bill as to the Pullens, Neisler, Morain and Bechtold and refuses to set aside the release as to the ninety acres conveyed to Neisler and denies a foreclosure against said 90 acres, but is erroneous in not setting aside the release as to the ten acres the title to which is still in Swart and in refusing a foreclosure against said ten acres. The decree is affirmed in part and reversed in part at the costs of appellees Crawford and Swart and the cause remanded with directions to the trial court to enter a decree in conformity with this opinion.

Affirmed in part, Reversed in part and Remanded with directions.

Gen. No. 6644. October Term 1916. Ag. No. 52.

Broadway Bank of St. Louis, Missouri,
Appellant.

vs.

The McGee Creek Levee and Drainage District,
Appellee.

Appeal from Pike

Statement

Appellant, a corporation organized under the laws of Missouri, filed a bill in equity against appellee, alleging that the McGee Creek Levee and Drainage District was organized in the county court of Pike county at the September Term 1905, under the provisions of an act entitled an Act, etc. for the organization of drainage districts, approved and in force May 29, 1879, commonly known as the Levee Act; that said drainage district was organized for the purpose of protecting about 11,000 acres of land from overflow by the waters of the "Illinois river" and creek waters, known as the Camp and McGee creek, by the construction of levees, ditches and the operation of pumping plants; that at the November Term, 1905, of the county court of Pike county, an order was made confirming a special assessment of benefits for constructing the original work of said district in the sum of $123,688.93, and that the commissioners issued bonds to the amount of 90 per cent of said assessment against it, said bond issue being for $111,000; that there remained of said assessment against the lands in said district over the bond issue $12,688. 93; that the assessment was divided into fifteen equal installments, the first payable December 1, 1911, the last December 1, 1925; that after the assessment had been confirmed a contract was let for the original work; that before the work was completed it was ascertained that the district did not have sufficeint funds to complete the work; that a petition for an additional assessment in the sum of $62,720 was filed under section 37 of the Levee Act; that the last named petition shows that only $106,000 had been received from the sale of the $111,000 bonds against the first assessment; that the original estimate for the

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pumping plant was $6000, but that it will cost $22,500; that notice of a hearing on said petition was given by posting and published under section 3 of the Levee Act; and that on the hearing on said petition, an order was made fiding that all parties owning land in the district or interested therein appeared in court or by counsel; that notice had been given as required by law; that to complete the work it will be necessary to

Gen. No. 5591. October Term 1916. Ap. No. 52.

Provident Bank of St. Louis, Missouri
Appellant.

vs.

The Jackson Three Lakes and [illegible]
Gas District. Appellee.

Appeal from Ohio

Statement

Appellant [illegible] of Missouri [illegible] ing that the [illegible] [illegible] Septem[illegible] entitled [illegible] [illegible]

raise $62,720; that the remaining 10 per cent of the original assessment is not available and money cannot be borrowed on it and all parties owning land in the district being in court in person or by counsel and the commissioners consenting, it was agreed and ordered all parties interested consenting, that said 10 per cent amounting to $12,688.93 shall be remitted to the land owners and not be collected when it matures and falls due, except so far as necessary for the payment of the bonds and that a special assessment of $62,720 be made upon the lands in the district.

The bill further alleges that, at the time of making the said last described order, J. E. Franklin was an owner of several thousand acres of land in said district and that at the time of making said order, he resided in Missouri and was not represented in said proceedings by counsel and was not personally before said court; that said Franklin never directly or indirectly consented to that part of the order purporting to be made by consent; that the second assessment was made and confirmed against the lands in the district and the commissioners issued and sold bonds to the amount of 90 per cen of such assessment; that before the construction work of the district was completed the funds of the district were exhausted and the district made application of J. E. Franklin to borrow $7000 to complete the work; that the commissioners of the district under section 38 of said act filed a petition to borrow a sum not exceeding $7000 against the original and the additional special assessments, subject to the issue of bonds, and an order was made permitting the borrowing of said sum, whereupon on Apr. 3, 1909, the commissioners issued a warrant to J. E.

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Franklin for $7000 payable out of any moneys from any assessments then levied and not otherwise appropriated, with interest at 6 per cent per annum and said Franklin loaned the district $7000 on said order and at that time said district had no other outstanding obligations except said bonds and said Franklin had no actual notice of the alleged consent order; that the warrant for $7000 is a lien upon the original and additional assessments subject only to the payment of the bonds issued against them; that Franklin endorsed said warrant to appellant for a valuable consideration, that appellant has demanded of appellee that the commissioners collect that part of the installments of the assessments not required for the payment of bonds and pay the interest on said warrant but the commissioners insist that the warrant is not a lien on said assessments and that the 10 per cent of the

[illegible]

original assessment has been remitted and released except so far as it may be necessary to pay the bonds issued against said assessment; that no petition was presented to the county court of Pike county to abate any part of the original assessment as required by sections 198 and 199 of an act in relation to the abatement of assessments in Levee and Drainage Districts, and that the order purporting to abate the ten per cent of the original assessment is void and the warrant held by appellant is a valid lien against said assessment.

The prayer of the bill is that, that portion of the order abating said ten per cent of the original assessment be vacated and set aside and that the original order be declared to be in full force and the warrant held by complainant he declared a lien against the original assessment.

The appellee demurred to the bill and sets up as special causes of demurrer:— (1) a want of necessary parties; (2) that the warrant is not negotiable; (3) that no part of the warrant is due; (4) that the part of the order complained of was entered by consent of the parties interested and binding on Franklin, and (5) that Franklin had notice of the order when he accepted the warrant.

The court sustained the general demurrer and also the second,

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third, fourth and fifth causes of spceial demurrer. The appellant elected to abide by its bill and a decree was entered dismissing it for want of equity.

Opinion by Thompson, P. J.

The bill seeks to vacate that part of the order of the county court that remits and abates to the land owners the sum of $12,688.93, the amount that the original assessment exceeded the amount of the bonds issued against it. Section 38 of the Drainage Act gives the commissioners the power to borrow not exceeding ninety per cent of the amount of the assessment unpaid at the time the bonds are issued.

The petition for the additional assessment was filed to the June Term, 1908, of the county court. The only notice given of that petition was given by mailing, posting and publishing under section 3 of the Levee Act.

Sections 198 and 199 of the act provide for the abatement of assessments for benefits and state what proceedings are necessary to secure such abatement. The petition must be filed 40 days before the term of court at which it is to be heard. It must be verified and notice must be published once each week for four

original assessment has been remitted and released except so far as it may be necessary to pay the bonds issued against said assessment; that no petition was presented to the county court of Pike county to abate any part of the original assessment as required by sections 108 and 109 of the act in relating to the abatement of assessments in Levee and Drainage Districts, and that the order purporting to abate the ten per cent of the original assessment is void and the warrant held by appellant is a valid lien against said assessment.

The prayer of the bill is that that portion of the order abating said ten per cent of the original assessment be vacated and set aside and that the original order be declared to be in full force and the warrant held by appellant be declared a lien against the original assessment.

The appellee demurred to the bill and set up as special causes of demurrer: (1) a want of necessary parties; (2) that the warrant is not negotiable; (3) that no part of the warrant is due; (4) that the part of the order complained of was entered by consent of the parties interested and binding on appellant, and that the Franklin had notice of the order when he received the warrant.

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the record.

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successive weeks, the first publication being not less than 40 days prior to the first day of the term.

The petition for the additional assessment does not set up the necessary facts that section 199 requires the petition to state. It was not verified as is required by the statute. The notice given was that required by section 3 of the Levee Act, which does not comply with the notice required to be given to procure an abatement under section 199.

Appellee contends that the order of the county court finds that Franklin, the payee in the warrant, was present either in person or by attorney and is concluded by that finding. The bill alleges that Franklin was not present either in person or by counsel and that he

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had no knowledge of any application for an abatement and had no actual notice of the order of abatement when he advanced the $7000 on the order.

This is not a collateral attack on the order of abatement but a suit in equity directly attacking the order. The order does not state that Franklin personally appeared but states that all the parties interested "appearing in open court or by conusel." Franklin is not mentioned by name, neither is any person mentioned as appearing as counsel for him. In drainage matters the county court is a court of limited jurisdiction and there is no presumption in favor of its jurisdiction in a statutory proceeding even when the attack on the jurisdiction is collateral. Payson vs. People, 175 Ill. 267; 23 C. Y. C. 1089. This order of abatement was made in a statutory proceeding. The statute must be literally complied with both as to the subject matter and the person, and if the petition is not sufficient to confer jurisdiction the appearance and consent of the land owners does not have that effect. People vs. Swearingen, 273 Ill. 630; Aldridge vs. Clear Creek Drainage District, 253 Ill. 251; People vs. Sangamon Drainage District, 253 Ill. 332; Johnson vs. Von Kettler, 84 Ill. 315; Watts vs. Dull, 184 Ill. 86; People ex rel. Hoyne vs. Stumpf 275 Ill. 81; 12 Encyc. of Pl. & Pr. 126. The county court did not, under the allegations of the bill, have jurisdiction of the subject matter to enter the order abating the assessment.

A drainage warrant is not negotaible paper, yet it may be tranferred, and the assignee may maintain suit on it in his own name subject to the equities between the original parties. Newell vs. School Directors, 68 Ill. 514; People vs. Brown, 194 Ill. App. 246. No reason is presented why the present holder of the warrant may

not prosecute a suit in chancery to vacate a void order, under which the district is refusing to collect the money from which the order should be paid, if it is not required to pay the bonds.

The fact that the warrent does not state when it is payable

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and is not a lien on any assessment is not a ground of demurrer to the bill to set aside the order. The order can only be paid out of assessments made when it was issued. Section 38 of the Levee Act makes warrants for borrowed money a lien on the assessments, and if this warrant is ever paid it must be paid out of the excess of the assessments above the bonds. This is not a suit to collect the warrant but to declare void an order which impairs and cancells the means of paying the warrant. The other special grounds of demurrer are disposed of by the disposition of the general demurrer.

The bill does not in terms state that the appellant is a corporation. Under scection 16 of the act under which appellant is organized the district is however made "a body politic and corporate" with the right to sue and be sued and facts are alleged which show it to be a corporation. It may be sued the same as any other municipal corporation. Under a cross error assigned by appellee, it contends that the property owners are necessary parties. A special assesments for benefits is in the nature of a tax against the property benefited. The corporation represents the property owners. No authority is cited showing any reason for making the property owners in a drainage district parties to a suit in equity against the district. There was on error in overruling the first ground of special demurrer.

Counsel for appellee also argue that appellant is guilty of laches, in that the order of abatement was entered in 1908, and it is said this suit was brought to the November Term 1915. There is, however, nothing in the record in this court from which it can be ascertained when the suit was begun. On pages 9 and 10 of their argument they contend that the suit is prematurely brought since it cannot be determined until 1925, how much is available for the payment of the warrant. Counsel say "If aft er the bonds are paid there remains a balance of those assessments uncollected and the commissioners of the district should fail and refuse to collect such remainder, it is then

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The contentions of appellee are inconsistent and evasive and therefore ineffective in equity. 1 Encyc. of Pl. & Pr. 942.

The court erred in sustaining the demurrer. The decree is reversed and the cause remanded with instructions to overrule the demurrer.

Reversed and Remanded with directions.

The contentions of appellee are inconsistent and evasive and therefore ineffective in equity. 1 Bacon, of Pl. & Pr. 342.

The court erred in sustaining the demurrer. The decree is reversed and the cause remanded with instructions to overrule the demurrer.

Reversed and remanded with directions.

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2765

Gen. No. 6645. October Term 1916. Ag. No. 88.

People of the State of Illinois,
Defendant in Error,

vs.

Chipman Ratcliff, Plaintiff in Error.

204 I.A. 594

Error to County Court of Adams County

Opinion by Thompson, P. J.

The states attorney of Adams county filed his information in the county court of that county charging Chipman Ratcliff with wilfully, maliciously and without cause destroying and injuring a well and pump that was appurtenant to Hazel Dell School house in said county.

The defendant in writing waived a trial by jury and the case was heard by the court and a fine of $3.00 imposed.

The evidence shows that John Ratcliff, the father of the defendant, was the owner of the north east quarter of section eleven in Concord Township, Adams County. He died some years ago, leaving a will which devised this land to his wife for life with remainder to his children. Hazel Dell School house is upon a half acre of land in the south east corner of the south east quarter of section two in the same township. There is, and has been ever since the school house was built, a public highway along the section line that separates the school house lot from the Ratcliff land. There is a public highway also on the east side of the Ratcliff land. There is a rough place, on the north east corner of the Ratcliff land so that it was inconvenient to fence along the line of the highway, and about twenty-five years ago, about an acre of the Ratcliffe land was not fenced from the highway. About ten years ago a fence was run diagonally across the open acre leaving a triangular half acre still unfenced. The school children used the unfenced land as a play ground. About ten years ago the school directors requested Ratcliff, the father of the defendant, to deed the unfenced land to the district.

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Ratcliff refused the request but gave the directors permission to sink a well on this land. There is nothing in the records of the district concerning the well. About three months before the filing of this information, the directors dug another well on the unfenced half acre without the consent of the Ratcliffs. The defendant notified the directors not to dig the last well and not to put a pump in it, and to keep off the half acre of land. The directors disregarded the notice. After they had dug the well and

placed the pump in it, defendant again notified them that he was going to fence in the land and requested them to move the pump. The directors taking no action he fenced the land and took the pump from the well and placed it on the school lot. While the directors claim that the half acre belongs to the district, the evidence shows the district has no deed to it; and until recently have not claimed any right there except with the license of Ratcliffs, while the Ratcliffs have always claimed to own the premises and paid taxes on it.

The defendant without malice and without creating any disturbance took possession of the land that belonged to the estate, after reasonable notice to the directors that the license was revoked. The well and pump were not appurtenant to the school site, but upon the land separated by a public highway from the school house lot. The judgment cannot be sustained on the evidence; it is reversed.

Reversed.

Gen. No. 6650. October Term, 1916. Ag. No. 55.

City of Sullivan, Appellee,

vs.

J. T. Henry, Appellant.

Appeal from Moultrie.

Opinion by Thompson, P. J.

Appellant was, on December 14th, 1915, fined $65 before a justice of the peace on a charge of having violated an ordinance of the city of Sullivan. On the day the judgment was entered he appeared in the office of the clerk of the circuit court and executed and filed a bond which purports to be a bond for an appeal from the judgment against him before the justice. He also deposited $130 in money with the circuit clerk, who endorsed on the bond, "Approved by me upon a sum of money equal to the bond being placed in my hands this 14th day of December, 1915. Fred O. Gaddis, Clerk of Circuit Court." Proper writs were issued and served and a transcript filed in the circuit court.

In the circuit court, the City of Sullivan appeared specially by counsel and moved to dismiss the appeal because the bond was not signed by a surety. The defendant entered a cross motion for leave to file a good and sufficient appeal bond. The court thereupon dismissed the appeal.

Similar proceedings were had in cases against E. M. Watkins and Henry Lincoln. By agreement of the parties, the three cases being identical except as to the names are consolidated in this court, and are heard together and the same judgment is to be entered in each case.

The only error assigned is that the court erred in dismissing the appeal and in not granting the cross motion of appellant.

The statute provides for appeals from justices of the peace in the following language, (Sec. 115, Chapter 79, Hurd's Statute.) "The party praying for an appeal shall, within twenty days from the

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rendition of the judgment from which he desires to take an appeal enter into bond with security to be approved and conditioned as hereinafter provided in substance as follows:" * * * The bond may be filed in the office of the justice rendering the judgment or the clerk of the court to which the appeal is taken. "When such bond is filed with the justice it shall be approved by him." "If the bond is filed with the clerk of the court to which the appeal is taken it shall be approved by him" and on the approval of the

bond by the clerk he shall issue a supersedeas and summons.

Section 69 of the Justice of the Peace Act of 1872, (Sec. 179 Hurd's Stat.) provides:— "No appeal from a Justice of the Peace shall be dismissed for any informality in the appeal bond. But it shall be the duty of the court before who the appeal is pending to allow the party to amend the same within a reasonable time so that a trial may be had on the merits of the case."

The instrument filed with the circuit clerk was a bond signed by the appellant. The clerk accepted a deposit of the amount of the bond in money with instructions from appellant to hold it as security on the bond, and by agreement between the clerk and appellant the money was exchanged for a certified check. The appellant in good faith attempted to perfect the appeal and the officers authorized by the statute to approve the bond did approve it on receipt in cash of the amount of the bond to hold as security for it. The bond as approved is not a full compliance with the form of the bond as given in the statute. Were it not for the form of the bond given in the statute the word security might be construed as it is ordinarily used, which would include something given or deposited as surety for the fulfillment of a promise, anything which renders a matter sure.

Section 115 of the Justice's Act directs that an appeal from a justice shall not be dismissed for any informality in the bond, and that the court shall allow a party to amend the bond within a

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reasonable time. In construing sections 115 and 179, the rule is laid down that even if a bond is defective and has been accepted and approved by the proper officer, the party endeavoring to appeal should not be prejudiced by any informality or deficiency in the bond, if he will, when objection is made, remedy the defect. Hubbard vs. Freer, 1 Scam, 467; Weist vs. The People, 39 Ill. 507; Town of Partridge vs. Snyder, 78 Ill. 519; Miller vs. Superior Machine Co., 79 Ill. 450; Horner vs. Gee, 64 Ill. 178; Wear vs. Killeen, 38 Ill. 259; Enright vs. Rehbach, 133 Ill. App. 50.

The instrument filed by appellant was a bond, and although not in compliance with the statute, the court should have allowed the cross motion of appellant to file a good and sufficient bond. The court erred in dismissing the appeal. The judgment is reversed and the cause remanded.

Reversed and Remanded.

A similar judgment will be entered in General Numbers 6651 and 6652.

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Gen No. 6658. October Term 1916. Ag. No. 61.

In the matter of the Estate of Jacob Brown, Deceased. Calvin J. Brown and Harvey R. Brown, Appellants.

Appeal from Fulton.

Opinion by Thompson, P. J.

Jacob Brown died in Fulton county in 1894. Letters of administration upon his estate were issued to Harvey R. Brown. A widow's award of $1710 was allowed to Priscilla A. Brown, the widow of the deceased, and various claims allowed against the estate, one being for $3588.96 in favor of Laura J. Boyed, a relative of the present county judge. In October 1896, an order was entered discharging the administrator, and approving his report, which states that the estate had been fully administered upon. That report shows the major part of the award and the claims allowed were unpaid and that there was nothing remaining available to pay the balance of the award and claims allowed.

At the December Term 1894, in a suit for partition, a tract of three acres of land was set off to the widow as and for her homestead in a tract of land Brown had owned in his life time. The widow died in March 1913. Harvey R. Brown had moved and become a non-resident of the State of Illinois. The order approving the report of the administrator and declaring the estate settled and the administrator discharged, only had the effect of closing the account to the time of the approval of the account. It is void as to unsettled matters of the estate and does not discharge the administrator. (Hughes vs. Atherton, 249 Ill. 317; State vs. Willoughby, 218 Ill. 485.) After the death of the widow, Harvey R. Brown was removed as administrator by an order of court in 1915, because he had become a non-resident of Illinois.

Petitions were filed by two daughters and a grandson of Jacob Brown, stating that Jacob Brown owned and occupied three acres of ground as his homestead in his life time and after his death that

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it had been occupied by Priscilla A. Brown, his widow, until her death March 8, 1913; that said homestead is now subject to sale to pay his debts including $1391.50 unpaid on the widow's award and requesting that Nannie E. Howe be appointed administratrix de bonis non.

The estate was transferred to the circuit court because of the interest of the county judge. Nannie E. Howe is the administratrix of the estate of Priscilla A.

Brown. Calvin Brown and Harvey R. Brown, two of the sons, appeared and resisted the appointment of any administrator de bonis non. The circuit court made an order appointing Nannie E. Howe, administratrix de bonis non. Calvin and Harvey R. Brown appeal.

The contention of appellants is that there is no estate of Jacob Brown unsettled for the reason that the widow, by a deed which appellants offered in evidence, conveyed the three acres set off to her for her homestead to Calvin Brown. If she had made such a conveyance, it would only convey her interest. It would not convey any interest of the heirs or creditors. The court did not err in refusing to admit the deed in evidence on an application for the appointment of an administrator. The court could not try the question as to the effect of a deed made by the holder of the homestead against the estate of Jacob Brown, until there was an administrator to represent the estate. It is neither disputed nor contended on behalf of appellants that the land in question was not the homestead of Priscilla Brown, assigned to her from the estate of Jacob Brown, nor that the estate has had the benefit of it. A prima facie cause for the appointment of an administrator was made out and parties claiming against the estate cannot try the right of property against the estate until the estate is represented.

The law in this state is that:— "When the widow of a decendent is in possession of premises as a homestead, which do not exceed

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in value $1000, the premises cannot be sold to pay debts until the termination of the homestead estate, and that the holder of unsatisfied claims may wait until the homestead estate is extinguished before applying for a sale of the property; and such property has been sold by order of court to pay debts where more than twenty years have elapsed since the claims were allowed." Atherton vs. Hughes, (Supra.)

It is insisted that the court erred in appointing Nannie E. Howe administratrix de bonis non, for the reason that she is the administratrix of the estate of Priscilla A. Brown. As administratrix of Priscilla A. Brown, she was interested in collecting the balance of the award, and if there is any estate of Jacob Brown unadministered she, as a daughter, is interested in securing it and applying it to the payment of the debts of Jacob Brown, the decedent. Which of the heirs should

be the administrator was a matter in the discretion of the court and all the heirs who sought the appointment of an administrator agreed upon the appointee. The appellants did not suggest that any other person be appointed, and the court should not appoint an administrator that would follow their wishes, when they are contending that there is no estate.

The order of the circuit court is affirmed.

Affirmed.

Gen. No. 6669. October Term, 1916. Ag. No. 67.

S. O. Smith and T. H. Cherry, Trustees for the People's Bank of Girard,

Appellees,

vs.

H. W. Knemoeller, Sheriff, Appellant

Appeal from County Court of Macoupin

Opinion by Thompson, P. J.

This is an action of replevin brought on the 17th of February, 1916, by the appellees, S. O. Smith and T. H. Cherry, trustees for the People's Bank of Girard, against the appellant H. W. Knemoeller, sheriff of Macoupin County, to recover possession of some horses and a heifer, which had been levied upon as the property of and taken from the possession of Fred Holtje by said sheriff, under an execution against Fred Holtje (Hulcher.) The execution was issued on December 2nd, 1915, on a judgment entered by confession for $589.90 on December 1st, 1915, in favor of H. B. Hill, against Fred Holtje. Appellees claim to be the owners and entitled to the possession of the property under a bill of sale made to them on November 28th, 1914, by the execution debtor. The property was taken under the writ of replevin.

The case was tried by the court without a jury and judgment rendered that the appellees have and retain the property replevied.

The only questions presented, that it is necessary to review, relate to whether the title to the property passed to the appellees under the bill of sale. The bill of sale on its face transfers the property to the appellees. It was acknowledged before a police magistrate in "La Salle County," on November 28th, 1914, and recorded in Macoupin county on the same day. It does not contain any provision giving the vendors the right to retain possession of the property transferred.

From the evidence of appellee, Smith, the property levied upon, with other property, was conveyed by the bill of sale as security for a debt of $1100 owing by Holtje to the Peoples Bank of Girard of which

appellees are trustees. Between the time of the making of the bill of sale and the levy, Holtje had reduced the debt $750 and he had the right to pay the balance at any time so that the bill of sale was really a mortgage. There appears to be an error in the record. The venue of the acknowledgement, in the bill of sale, is stated to be La

Salle County, but a proper venue would not make the bill of sale valid against third parties.

A sale of chattels, where possession remains with the vendor, is fraudlent per se and void as to creditors, where the property is of such a nature that possession can be taken from the vendor and the property removed at the time of the sale. Thornton vs. Davenport, 1 Scam. 295; Tisknor vs. McClelland, 84 Ill. 471; Rozier vs. Williams, 92 Ill. 187; Pennywit vs. Lindsay, 162 Ill. App-102; Trimble vs. Hunt, 169 Ill. App. 259; Jacobson vs. Patterson, 190 Ill. App. 266. There is no difference in effect between a sale made with actual intent to defraud creditors and one fraudulent by operation of law. Notice of either is only notice of an illegal transaction and not binding upon a creditor. Howell vs. D. B. Fisk Co., 52 Ill. App. 310; Sec. 26, Chapter 121 a, Hurd's Statute, (Uniform Sales Act.) The judgment of the county court is reversed and the cause remanded with instructions to render a judgment in favor of appellant and to award a writ of retorno habendo.

Reversed and Remanded with directions.

Gen. No. 6673 October Term, 1916. Ag. No. 70.

Henry W. Oetgen, Appellee,

vs.

Jesse Lowe, Appellant.

Appeal from Schuyler

Opinion by Thompson, P. J.

This is a suit in assumpsit begun by Henry W. Oetgen against Jesse Lowe and George B. Christie. The declaration consists of one count which pleads a contract in writing executed by the defendants whereby, in consideration of a conveyance of twenty two and one half acres of land to defendants by plaintiff, the defendants agreed to drain and protect the remaining land of plaintiff, in a drainage district to be organized, from overflow and to pay all assessments that might be made against the other lands of plaintiff in said proposed district; that the defendants have not paid said assessments, which have been levied against the lands of plaintiff in the district so organized, for the years 1909 to 1914, inclusive, and by reason of the failure of defendants to pay said assessments, they have become liable to pay said sums to plaintiff.

Lowe filed a plea of the general issue and a plea of release. To the plea of release the plaintiff replied that he did not make a release; that there was no consideration for a release, and that the supposed release was a contract not in writing and not to be performed within a year. Issues were joined on the first two replications, and rejoinders to the third replication that it was to be performed within a year, and that is was fully executed. There is nothing in the record showing that Christie was served with process of summons, and he did not appear in the case. A jury returned a verdict for plaintiff for $328.57 on which judgment was rendered against Lowe, and he appeals.

The evidence shows that the defendant made the agreement set out in the declaration. There are 6700 acres of land in the drain-

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age district in question, of which Christie and Lowe own about 5000 acres. Appellee had owned 80 acres within the territory of the district but had deeded 22½ acres to Christie and Lowe. In consideration of this conveyance, Christie and Lowe agreed to see that appellee's land was drained by the ditches of the district and protected from overflow by levees and to pay all assessments made by the district against his remaining land. Some years after the dis-

trict had been organized, it was found that a large amount of additional work was necessary to make the reclamation a success.

The appellant and Christie had made contracts similar to the contract with appellee with a number of other owners of land in the district.

The contention of Lowe is that he and Christie, who together owned nearly five sixths of the land in the district, would not permit the district to take action toward the necessary additional work, unless the other land owners would release appellant and Christie from the contracts made by them to pay all assessments. Lowe and Christie authorized T. J. Condit and F. J. Traut to act for them in procuring releases and making the additional improvements.

Condit testifies that "we represented to Mr. Oetgen that all these parties would cancel their contracts except that I would not be responsible for Mr. Hood or Mr. Schultz. Mr. Schultz had said he would not do so, but would consider it further. I told Mr. Oetgen I thought Mr. Schultz would finally do so, I wouldn't state that he had agreed to;" that Schultz did not agree to it; that Oetgen said he would sign the release when the others were all fixed up; that he had the releases for their signatures and that the estimate for the additional improvements was $35,000 to $40,000 but they cost $80,000.

The appellee did not sign a release, and testified that the

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only agreement he made was to sign the release, if all the others except Hood released. In 1912, he learned that P. E. Mann, an owner of land who held a contract similar to that of appellee, had not released and had never paid any assessments. From the evidence of Condit it appears that the minds of the parties did not meet and there was no release by appellee. It also appears that appellee paid the assessments supposing the releases had been obtained as stated. The appellee produced official receipts for two of the payments. He testified to the amounts that he paid for the other years. The amount of the assessments against appellee's land was agreed upon as appears by a stipulation. The declaration does not in terms aver that appellee had paid the assessments except by inference from the averment that by the failure of defendants to pay the assessments they had become liable to pay said sums to him. The only objection that appellant made to the oral evidence

ment of the assessments by appellee was that of the best evidence. He cannot urge now that it was a variance, when it was not urged below. If a special demurrer had been filed or the objection made that it was not admissable under the pleadings, the objection would have been remedied by an amendment.

The court admitted in evidence a stipulation, that P. E. Mann would testify that he was the owner of 80 acres of land within the Coal Creek Drainage District; that Christie and Lowe contracted with him to pay the assessments levied against his land and that he never released the contract and has not paid any assessments against his land. It is argued that the court erred in admitting the stipulation in evidence because the contract could only be proved by the writing itself and the statement that "he never released" is a conclusion. The record does not contain any objection to the admission of the stipulation hence the question is not saved for review.

It is argued that appellee's sixth given instruction which tells the jury, that if the appellant fails to prove a release of the contract sued on as explained in these instructions, then ap-

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pellee can recover, etc. because it requires the jury to examine all the instructions to determine whether appellant had failed to prove a release. The instructions are given as a series and this instruction properly required the jury to consider all the instructions on the question of release in connection with the evidence.

It is also contended that the court erroneously modified appellant's ninth and tenth instructions. The ninth instruction as given contained the sentence "and if you further believe that plaintiff accepted said proposition **and without annexing any condition relative to other land owners, except Hood, holding similar contracts making similar releases,** and agreed to release the said Christie, etc. * * * your verdict should be for defendant." The court inserted the words that are in italics. The tenth contained the same sentence and the court made a similar insertion but leaving out the words "except Hood." The instructions directed a verdict and it is not pointed out wherein the modifications are erroneous. The agent of appellant and appellee had testified to the condition inserted by the court. The instructions as asked omitted that condition. It was a material part of the agreement for the release and

there was no error in the modification. We find no error against appellant in the giving or modifying of instructions.

The finding of the jury is amply sustained by the evidence. The judgment is affirmed.

Affirmed.

there was no error in the modification. We find no error against appellant in the giving or modifying of instructions.

The finding of the jury is amply sustained by the evidence. The judgment is affirmed.

Affirmed.

Gen. No. 6682. October Term, 1916. Ag. No. 76.

Wm. C. Bell, Administrator, etc.
Plaintiff in Error
vs.
John A. Egelhoff, et als.
Defendant in Error

Error to Jersey

Opinion by Thompson, P. J.

This is a suit in equity begun by William C. Bell, administrator of the estate of John Englehoff, against John A. Egelhoff, Magdelena Groppel and Joseph Schmeider, seeking to foreclose a vendor's lien on the undivided half interest of John A. Egelhoff in two hundred acres of land, that John Eglehoff had conveyed to John A. Egelhoff and Magdelena Groppel, and for an accounting against said John A. Egelhoff and Magdelena Groppel. The defendants filed answers denying the allegations of the bill, except the death of John Egelhoff and the conveyance alleged in the bill. The answers insist that nothing is due the estate and assert that a subsequent deed, made by John A. Egelhoff, Magdelena Groppel and John Egelhoff to John Schmeider and John A. Eglehoff, is a release of the alleged lien. Replications were filed, and the cause referred to the master to report the evidence. The cause was heard on the report of the evidence made by the master, and a decree entered dismissing the bill for want of equity. The administrator has sued out a writ of error to review the decree.

On December 31, 1908, John Egelhoff "in consideration of $5000, the receipt of which is hereby acknowledged, mutual love and affection and of the covenants and conditions herein contained," conveyed and warranted to John A. Egelhoff, a son of the grantor, and to Magdelena Groppel, a daughter of the grantor. certain described tracts of land containing 200 acres. The deed contains the following covenants:— "The grantees herein covenant" that within one year after the death of the grantor they will each pay to Louisa Wiest, a daughter of the grantor $1000 "and that they will each pay to the

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grantor the sum of $250 annually in two payments of $125 each, payable April 1st, and October 1st, during the life of the grantor "and upon the death of said grantor, the said grantees shall be released from all further liability to any payments whatsoever." It is further covenanted that in case the grantor is unable to

meet expenses which he may incur by sickness, the grantees are to pay all just debts so incurred which he cannot meet. The grantees also assume a mortgage of $1700 held against said real estate by John A. Shephard. "It is further covenanted and agreed that the payments herein stipulated to be paid by the grantees shall be liens against their respective interests in the land and shall draw 6 per cent interest after maturity."

On May 31, 1912, John A. Egelhoff, Magdelena Groppel and John Egelhoff, in consideration of $21,000, in hand paid, conveyed and warranted to John A. Egelhoff and Joseph Schmeider the same premises that were conveyed in the deed to John A. Eglehoff and Magdelena Groppel. John Egelhoff died January 30, 1914.

The contention of plaintiff in error is that John A. Egelhoff and Magdelena Groppel were to pay the $5000 mentioned as the consideration paid, in the deed dated December 31, 1908, and the $250 to be paid annually by each of them to John Egelhoff and that they have not paid said sums and that the lien reserved for the payments stipulated to be paid should be foreclosed. The contentions of defendants in error are (1) that the $5000 mentioned was not stipulated to be paid (2) that the lien of any sums to be paid by the grantees in the deed of December 31, 1908, was released by the deed dated May 31, 1912, and (3) that they have paid all sums agreed to be paid.

The deed to John A. Egelhoff and Joseph Schmeider executed by John Egelhoff joining with John A. Egelhoff and Magdelena Groppel on May 31, 1912, is in effect a release of all liens for any sums whatever to be paid by John A. Egelhoff and Magdelena Groppel to John A. Egelhoff. Egelhoff clearly had the right to release the lien for

any moneys to be paid him ,and there is no allegation that there was any fraud in the transaction or any prayer that the release be set aside.

Prior to December 31, 1908, there had been a suit for separate maintenance brought by the wife of John Egelhoff against him and in the settlement of that suit he had conveyed the home farm of 200 acres and other property to his wife. After the settlement the children of the couple took sides between the father and mother, so that the mother favored some of the children, and the father favored those who took his side in the controversy. The father made a deed to a daughter Mrs. Ahrling, another deed to Mrs. Bell, wife of plaintiff in error, which memtioned considerations of $5000. These

deeds were gifts and the considerations mentioned were neither paid nor to be paid. The sum of $2000 mentioned in the deed of December 31, 1908, to be paid to Mrs. Wiest was a gift to her. The evidence of a number of witnesses shows that the deceased frequently had said that he had given the property to the children to whom it was deeded, and that he had provided in the deed for his support.

There is no covenant in the deed of December 31, 1908, under which the grantees by the acceptance of said deed agreed to pay the sum of $5000 mentioned in that deed, but by making the deed the grantor acknowledged the receipt of such sum. The only payments to be made under the covenants in the deed are the payments therein stipulated to be paid by the grantees. The only payments stipulated to be paid are the sums of $1000 by each of the grantees to Mrs. Wiest; the $1700 mortgage; the semi annual payments by each of them of $125 during the life of the grantor, and the expenses incurred by his sickness, if he should be unable to meet such expenses. The $5000.00 mentioned as a consideration is not stipulated to be paid. It was a gift and appellant is not entitled to any foreclosure therefor.

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Defendant in error, John A. Egelhoff introduced in evidence a receipt for $125 bearing date April 1, 1912, signed by John Egelhoff which recites that he had that day received from John A. Egelhoff $125 in full of all accounts to date and a check executed by him payable to the order of John Egelhoff dated December 6, 1913, for $25 which is endorsed by John Egelhoff and has written in the corner of it "In full of all accounts to date." There was also introduced in evidence a note dated January 2, 1911, for $400 payable to the order of John A. Egelhoff one year after date and executed by John Egelhoff. This note bears the following endorsements: "In lieu of agreement dated Dec. 31,1908." Received on within note one hundred dollars, September 16, 1911; $125 October 1, 1912, and $75 October 9, 1913. No objection was made to the admission in evidence of the note with the endorsements.

The evidence also shows that John Egelhoff boarded with Mrs. Groppel at $5 per week, and that shortly before his death he had said that they had not settled for some time and he did not want to ask her for money because he believed he owed her.

The clause in the deed which provides for the semi-annual payments also provides that on the death of John

Egelhoff "the grantees shall be released from all further liability as to any payments whatever," is a release of the semi-annual payments that had not matured at his death. It is a declaration of the rule of law that if an annuitant dies before the day of payment his representatives cannot claim any portion of the annuity for the current term. 3 Corpus Juris 217; 2 R. C. L. 11.

The record also shows that John A. Egelhoff and Magdelena Groppel were each cited, on the motion of plaintiff, in error, to appear in the county court to disclose assets belonging to the estate of John Egelhoff and on a hearing were discharged and the citations dismissed.

The finding of the trial court that the defendants in error are not indebted to the estate in any of the matters alleged in the

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bill is sustained by the evidence. The decree dismissing the bill for want of equity is correct and is affirmed.

Decree Affirmed.

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Gen. No. 6584. October Term, A. D. 1916. Ag. No. 81.

People of the State of Illinois,
Defendant in Error,
vs.
Johanna Unkel, Plaintiff in error.

Error to County Court
Vermilion County

Eldredge, J.

Plaintiff in error was convicted under the 4th count of an indictment charging her with keeping a common, ill-governed and disorderly house, to the encouragement of idleness, gaming, drinking and other misbehavior, and was fined $150 and costs. The evidence of the People rested wholly upon the testimony of three detectives who visited the boarding house kept by plaintiff in error, which, if believed by the jury, was sufficient to sustain the conviction. The facts testified to by these witnesses were denied by Mrs. Unkel but it was for the jury to determine what credit should be given to the testimony of the different witnesses and only when the record shows that the verdict is clearly against the manifest weight of the evidence, can this court assume that duty. Complainant is made of the admission of some of the evidence but the evidence referred to was of such small importance and had so little bearing on the case that its admission if erroneous was not reversable error.

The judgment is affirmed.

Gen. No. 3584. October Term, A. D. 1916. Ag. No. 31.

People of the State of Illinois,

Defendant in Error,

vs.

Johnson Lund, Plaintiff in error.

Error to County Court

Vermilion County.

Mr. Justice [illegible] delivered the opinion of the court:

Plaintiff in error was convicted under the 4th count of an indictment charging him with keeping a common ill-governed and disorderly house, to the encouragement of idleness, gaming, drinking and other disorderly conduct, and was fined $100 and costs. The evidence of the People rests wholly upon the testimony of three detectives who visited the boarding house complained of. We find no error which should be followed by the jury, was sufficient to sustain the conviction. The first instruction to the jury to determine what weight should be given to the testimony of the different witnesses and only upon the record shows that the verdict is clearly against the weight of the evidence, [illegible] of the evidence, but [illegible] well supported [illegible] that [illegible] if [illegible] [illegible] The judgment [illegible] affirmed.

(Seal.)

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Gen. No. 6594. October Term, A. D. 1916. Ag. No. 9

E. C. Creamer, Plaintiff in Error.

vs.

John Schmidt, J. F. Messman and John Henry, Defendants in Error.

Error to Circuit Court Champaign County

204 I.A. 62

Eldredge, J.

On June 4th, 1914, a petition was presented to the Commissioners of Highways of Pesotum township, Champaign County, signed by the requisite number of land owners, praying that a new road 40 feet wide be laid out on the section line between Sections 2 and 11 in said township. The route of the proposed road ran across the lands of the plaintiff in error and also across the right of way of the Illinois Central R. R. Co. The Commissioners, upon receiving the petition, fixed the day of September 5th, 1914, as the time when they would examine the route of such road and hear reasons for and against the laying out of the same. They gave 10 days notice of the time and place of such hearing by posting notices in 3 of the most public places in the town in the vicinity of the road to be laid out, in accordance with Section 76, Chapter 121, R. S. Sections 103 and 104 of said Chapter, however, required that similar notices should be served on any railroad company across or along the side of whose railroad it may be proposed to locate a public road, by delivering a copy thereof to the station agent nearest to the proposed location of said road. The Commissioners neglected to serve such notice on the agent of the Illinois Central Railroad Co. At the meeting held on September 5, 1914, the plaintiff in error was present and objected to the granting of the prayer of the petition.

The Commissioners, however, decided to lay out the road and entered an order to that effect. Nothing further was done in regard to the matter until January 5th, 1915, when the Commissioners having come to the conclusion, that the order entered by them September 5th, 1914 granting the prayer of the petition and ordering the road to be laid out, was void for the reason that they had failed to serve any notice on the Illinois Central R. R. Co., in accordance with the provisions of the statute above mentioned, and passed a resolution declaring that said order be vacated and also entered a new order for another preliminary meeting to be held January 23rd, 1915. Proper notices of this meeting were posted and also served upon the agent of the Railroad Company in accordance with the provisions of the statute. On January 23rd the prelim-

Gen. No. 6596. October Term, A. D. 1916. Ag. No. 9

R. C. Creamer, Plaintiff in Error.

vs.

John Schmidt, J. F. Jessman and John Henry, Defendants in Error.

Error to Circuit Court
Champaign County

Eldredge, J.

On June 4th, 1914, a petition was presented to the Commissioners of Highways of Pesotum township, Champaign County, signed by the requisite number of land owners, praying that a new road 40-feet wide be laid out on the section line between Sections 2 and 11 in said township. The route of the proposed road ran across the lands of the plaintiff in error and also across the right of way of the Illinois Central R. R. Co. The Commissioners, upon receiving the petition, fixed the day of September 5th, 1914, as the time when they would examine the route of such road and hear reasons for and against the laying out of the same. They gave 10 days notice of the time and place of such hearing by posting notices in 3 of the most public places in the town in the vicinity of the road to be laid out, in accordance with Section 16, Chapter 121, R. S. Sections 102 and 104 of said Chapter, however, required that similar notices should be served on any railroad company across or along the side of which railroad it may be proposed to locate a public road, by delivering a copy thereof to the station agent nearest to the proposed location of said road. The Commissioners neglected to serve such notice on the agent of the Illinois Central Railroad Co. At the meeting held on September 5th, 1914, the plaintiff in error was present and objected to the granting of the prayer of the petition.

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The Commissioners, however, decided to lay out the road and entered an order to that effect. Nothing further was done in regard to the matter until January 5th, 1915, when the Commissioners having come to the conclusion that they had made an error in their September 5th, 1914 order, entered a new order granting the prayer of the petition and ordering the road to be laid out, was void for the reason that they had failed to give any notice on the Illinois Central R. R. Co., in accordance with the provisions of the statute above mentioned, and passed a resolution declaring that the order [illegible] and also entered a new order for another [illegible] meeting to be held January 22nd, 1915. Proper notice of this meeting were posted and also served upon the agent of the Railroad Company in accordance with the provisions of the statute. On January 22nd the petit-

inary meeting was again held and an order entered granting the prayer of the petition and ordering the road to be laid out. The survey of the proposed road having been completed, and the Commissioners having failed to agree with plaintiff in error upon the amount of damages that the latter should have for the taking of his land, within 10 days of the date of the meeting filed a certificate with a Justice of the Peace for the purpose of having said damages assessed by a jury, and plaintiff in error was served with a summons to appear before said Justice on February 2nd, 1915, the date fixed for the hearing on this question. He appeared before the Justice and objected to the proceeding on the ground that the Justice had no jurisdiction because the certificate of the Commissioners was not filed with the Justice within 10 days from the 5th day of September 1914, the day that the petition was first heard. The objection was overruled and the parties proceeded with a trial which resulted in the assessment of damages for plaintiff in error in the sum of $800. Plaintiff in error prayed an appeal from the judgment before the Justice to the County Court, where, upon another trial, his damages were assessed at $700. Thereupon plaintiff

in error made a motion for a new trial which was granted, after which he dismissed his appeal.

Plaintiff in error then filed his petition in the Circuit Court praying that a writ of certiorari issue, directed to the Commissioners of Highways of said town, commanding them to make return of the record in said proceedings. The writ was issued and served and the Commissioners made their return. The plaintiff in error then moved that said return be quashed. The Circuit Court after a hearing upon the matter denied the motion to quash the return and entered judgment quashing the writ.

It is first insisted by plaintiff in error that the provision of the statute requiring the certificate for the assessment of damages to be filed with the Justice of Peace within 10 days of the date of the order lying out the road is mandatory, and that the Commissioners having ordered the road to be laid out on September 5th, 1914, and having failed to file said certificate with the Justice within 10 days from that date, they lost all jurisdiction of the matter and the order for the laying out of the road, and the assessment of damages to the plaintiff in error, were void and of no force or effect. We cannot agree with this contention. The record fails

inary meeting was again held and an order entered granting the prayer of the petition and ordering the road to be laid out. The survey of the proposed road having been completed, and the Commissioners having failed to agree with plaintiff in error upon the amount of damages that the latter should have for the taking of his land, within 10 days of the date of the meeting filed a certificate with a Justice of the Peace for the purpose of having said damages assessed by a jury, and plaintiff in error was served with a summons to appear before said Justice on February 2nd, 1915, the date fixed for the hearing on this question. He appeared before the Justice and objected to the proceeding on the ground that the Justice had no jurisdiction because the certificate of the Commissioners was not filed with the Justice within 10 days from the 5th day of September 1914, the day that the petition was first heard. The objection was overruled and the parties proceeded with a trial which resulted in the assessment of damages for plaintiff in error in the sum of $800. Plaintiff in error prayed an appeal from the judgment before the Justice to the County Court, where, upon another trial, his damages were assessed at $750. Thereupon plaintiff

(Page 2)

in error made a motion for a new trial which was granted, after which he dismissed his appeal.

Plaintiff in error then filed his petition in the Circuit Court praying that a writ of certiorari issue directed to the Commissioners of Highways of said town, commanding them to make return of the record in said proceedings. The writ was issued and served and the Commissioners made their return. The plaintiff in error then moved that said return be quashed. The Circuit Court after a hearing upon the motion denied the motion to quash the return and entered judgment quashing the writ.

It is first insisted by plaintiff in error that the provision of the statute requiring the certificate for the assessment of damages to be filed with the Justice of the Peace within 10 days of the date of the order laying out the road is mandatory, and that the Commissioners having ordered the road to be laid out on Sept[illegible] 1914, and having failed to file said certificate with the Justice within 10 days from that date, they lost jurisdiction of the matter and the order for the laying out of the road, and the assessment of damages to the plaintiff in error, were void and of no force or effect. We cannot agree with this contention. The second fact

to show affirmatively that any notice had been served upon the agent of the Railroad Campany prior to the meeting of September 5th, 1914 as required by the statute. The statutory provisions as to the notice of proceedings to lay out a road are mandatory and jurisdictional and unless complied with, the Commissioners have no authority to act, and any action so taken is without jurisdiction and void. No notice having been served on the Railroad Company, the Commissioners, had no authority or jurisdiction to enter the order of September 5th, 1914. The attempted proceedings had at that time were a nullity and had no more effect than if they had never taken place, as the Commissioners had no power to proceed to enter an order to lay out the road

at that time. Matthiessen v. Ott, 268 Ill., 569 and cases cited. The resolution passed by the Commissioners January 5th, 1915 by which it was attempted to vacate the order of September 5th, 1914 is of no importance as it was simply an attempt to vacate an order which in law did not exist. All the subsequent proceedings of the Commissioners from September 5th, 1915 were entirely regular and in accordance with the statutory requirements.

It is next urged that the Justice of the Peace had no jurisdiction to hear the assessment of damages for the reasons, first, that the year on the date of the summons was omitted therefrom; and, second, that the Justice did not write the words "Justice of the Peace" after his name when he signed the summons. Whatever force this contention may have it can only go to the jurisdiction of the person of plaintiff in error. The Justice acquired jurisdiction of the subject matter when the certificate of the Commissioners was filed with him. Plaintiff in error appeared before the Justice personally on the trial, prayed an appeal to the County Court, appeared in that Court personally on another trial, made a motion for a new trial, which was granted, and then dismissed his appeal. By these acts he certainly submitted his person to the jurisdiction of the court.

Complaint is also made that on the dismissal of the appeal no **procedendo** was awarded and that plaintiff in error cannot avail himself of the judgment in his favor for the damages awarded before the Justice. Plaintiff in error dismissed his own appeal and if he had desired a **procedendo** to have been issued all he would have had to have done was to have made a motion to that effect and it would have been awarded. A **procedendo** may be issued at any time upon motion of either party.

The judgment of the Circuit Court is affirmed.

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The judgment of the Circuit Court is affirmed.

Gen. N. 6599. October Term, 1916. Ag. No. 12.

Claus Tomhave, Appellant.

vs.

Richard H. Vortman, Appellee.

Appeal from Circuit Court
Morgan County

Eldredge, J.

Appellant sued appellee in an action of trespass for the cutting of osage orange hedge trees owned by the former. The pleas of general issue and **liberum tenementum** were filed to the declaration. The cause was tried before the court without a jury and judgment rendered for appellee.

The appeal from this judgment was originally taken to the Supreme Court, but was by that court transferred to this court for the reasons stated in the opinion, Tomhave vs. Vortman, 274 Ill. 28, which is referred to for a statement of facts and the issues involved.

The proofs showed that the hedge in controversy was six feet within the line of appellant's land which appoined the land of appellee located on the east side thereof. There had originally been a wooden fence on the line between the two tracts and the hedge was planted by appellant's predecessor several feet west of the fence. When the wooden fence ceased to exist is not shown by the proofs. Appellee claimed that he had a license to cut the south half of the fence for poles or posts. This contention is based upon an alleged conversation between appellant and appellee had in 1905 shortly after appellant bought the land, in which appellee testifies that appellant told him that they would leave the hedge standing there and let it grow up for posts and each take one half. There was no plea of license but it is insisted by

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appellee that both parties tried the case in the court below upon the theory that all evidence of justification should be admitted irrespective of the pleadings, and therefore appellant is now estopped from asserting that the defense of license could not be made on the ground of the lack of a plea putting that question in issue.

Even if it be assumed that the case was tried upon the theory mentioned and a plea of license was thereby waived, there is no proof of any such license. The conversation referred to, which is denied by appellant, was at most but a promise by appellant in effect that when the hedge grew up sufficiently he would give appellee half of the posts. The language used can not be

Gen. No. 6303. October Term, 1916. Ag. No. 12.

Claus Tomlinson, Appellant,

vs.

Richard H. Vorthman, Appellee.

Appeal from Circuit Court
Morgan County

Abstract of Decision.

Appellant and appellee [illegible] the settling of some corners [illegible] by the former. The plaintiff [illegible] monument were filed to the [illegible] tried before [illegible] a jury [illegible] leave for appellee.

The appeal from this judgment was originally taken to the Supreme Court, but [illegible] to this court [illegible] Tomlinson, [illegible] Vorthman, [illegible] statement of facts and the [illegible] Abstract.

[illegible]

construed to mean that appellant gave appellee any permission to cut the trees at all, and much less to cut them whenever he saw fit so to do. Moreover, when appellant saw appellee starting to cut the trees he notified him that he was committing a trespass and ordered him to stop. This was a revocation of the supposed license if it ever existed. Such a license carries no interest in the realty, and is revocable at the will of the person who grants it. Ragin v. Stout, 182 Ill. 645. If the defense of license was properly an issue the judgment is erroneous, first because there was no evidence to sustain such a defense, and second, because even if there had been originally such a license it was subsequently revoked.

The judgment is reversed and cause remanded.

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The judgment is reversed and cause remanded.

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(16,117)

(2776)

Gen. No. 6602. October Term, A. D. 1916. Ag. No. 15.

Anna M. Niederer, Appellee,

vs.

Edward H. Niederer Appellant.

Appeal from Circuit Court Cass County

204 I.A. 624

Eldredge, J.

Anna M. Niederer, appellee, filed her bill in equity in the Circuit Court of Cass County in which it is alleged in substance that she, together with her brothers, Edward H. (appellant,) Arnold, John and Frederick and her deceased sister, Minnie, were on the first day of January, 1906, the owners in fee simple as tenants in common, subject to the life estate of their mother, of certain premises located in the Village of Chandlerville in Cass County; that said premises were improved by buildings used for business purposes and that all of said persons entered into the following written agreement:

> "Whereas, certain of us have contracted for the enlargement and improvement of the brick building adjoining to us in Chandlerville; and whereas, some of us have not the ready money to pay for our share of such improvement.
>
> We hereby agree to pay the cost of such improvement equally and we agree that such of us advance more than our equal share of such expense shall have a lien upon the interest of those who do not advance our share of such cost in said building and we agree that upon the completion of the work we will execute proper papers which will enable those who advance the excess of this share to be secured for the balance until the same is paid. And we further agree that the rents and profits of said buildings in the excess of such sums over mother's shall need for her support shall be applied upon the payment of such claims for advances aforesaid.
>
> Arnold Niederer,
> Fred Niederer,
> Edward Niederer,
> Anna Niederer,
> John Niederer,
> Minnie Niederer."

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It is further alleged in the bill that appellee and her sister Minnie made the contemplated improvements and paid for the same; that subsequently Minnie died in January, 1907, testate leaving her surviving no husband and no children nor descendants of children, and by her last will, which was duly probated, devised and bequeathed to appellee all her property real and personal; that after said improvements were made, Frederick, conveyed all his interest in said premises to appellee and that by reason thereof and of the will of Minnie, appellee is now the owner of an undivided one half of said premises subject to said life estate; that Edward H., John and Arnold each own an undivided one sixth thereof subject

to said life estate; that John and Arnold have sold or are about to sell their respective interests in the premises to Edward H. without reimbursing appellee for their respective shares of the cost of said improvements advanced by her and Minnie; prays that an accounting be taken of the amount due to appellee from each of the defendants and that liens to secure the payments of such amounts be declared and foreclosed upon failure of defendants or either of them to pay the same within a reasonable time.

All the defendants defaulted except appellant and Frederick Niederer. Frederick Niederer filed an answer confessing the bill. The answer of appellant claims numerous items of set off for money loaned to appellee and for taxes and special assessments paid by appellant on lands in Mason County also owned by the parties to this suit as tenants in common. The answer also admits that John and Arnold have conveyed their interest in the premises to appellant and denies that he had any notice that said improvements were made. A general replication was filed to the answer. The decree found that appellee and her sister Minnie, pursuant to said agreement paid for improvements on the building in the sum of $2697.94; that neither appellant, John nor Arnold had paid their shares of the cost; that appellee was the sole devisee and legatee under the will of Minnie Niederer,

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deceased,

whose estate had been fully administered and settled; that there was due appellee from John and Arnold each one-sixth of the cost of the improvements or the sum of $449.65 with interest at the rate of five per cent per annum from August 10th, 1906, the date of the last payment on the improvements, to January 10th, 1916, amounting to a total of $661.34; that on an accounting with appellant there was due to appellee from him the sum of $38.38; that a lien be declared and established in favor of appellee against the interests owned by John, Arthur and appellant respectively at the time the agreement was made; that unless the amounts mentioned were paid by the defendants named within a certain time said liens should be foreclosed as to such interests as might be in default.

It is first contended that the proof does not show that the payments for the material and labor which went into the improvements represented the fair cash, market value thereof. Without discussing the evidence on this question in detail we are satisfied that it was suffient to establish these facts.

It is next urged that the court erred in allowing interest on the money paid. Interest was clearly allowable because the money was advanced by appellee for appellant's use. Chap. 74. Sec. 2 R. S.; Perrin v. Parker. 125 Ill. 201; Harvey v. Drew, 82 Ill. 606.

The fact that the decree permitted appellee to recover for the amount paid by her deceased sister Minnie is assigned as error, it being insisted that the executor of her will should have been a party complainant. The will made appellee the sole legatee and devisee. A chose in action is assignable in equity and will be enforced therein together with the lien securing it. Chicago Title & Trust Co. v. Smith, 158 Ill. 417.

It is also insisted that it was error to decree that the liens on the interests of John and Arnold be superior to and have priority over the deeds conveying their respective interests to

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appellant because appellant was an innocent purchaser without notice whether John or Arnold had paid their respective shares of the cost of the improvement and the liens thereby discharged. He was a party to the agreement and knew the improvements had been made and was bound to ascertain whether the interest purchased from his brothers were free from the liens created by the agreement.

The other errors argued relate solely to questions of fact on which there was a conflict of evidence and we are not disposed to disturb the findings of the Master and Chancellor in regard thereto.

The decree is affirmed.

(Page 4)

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The fact that the decree permitted appellee to recover for the amount paid by her deceased sister Mary is assigned as error, it being insisted that the executor of her will should have been a party complainant. The was made appellee the sole legatee and devisee. A cause of action is assignable in equity and will be enforced therein together with the lien securing it. Chicago Title & Trust Co. v. Smith, 158 Ill. 417.

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(Page 3)

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The other errors assigned relate solely to questions of fact on which there was a conflict of evidence and we are not disposed to disturb the findings of the Master or the Chancellor in regard thereto.

The decree is affirmed.

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Gen. No. 6614. October Term, A. D. 1916. Ag. No. 27.

William A. Compton, Defendant in error,

vs.

Mary Pearl Compton, Plaintiff in error.

Error to Circuit Court McDonough County

Eldredge, J.

William A. Compton, defendant in error, filed a bill for divorce from his wife, Mary Pearl Compton, plaintiff in error, in which ti is alleged that the parties were married March 5, 1890, and lived together as husband and wife until October 23, 1912, when she willfully deserted him without reasonable cause for more than two years prior to the filing of the bill. Mrs. Compton filed an answer to the bill in which are set out facts tending to show that she did not willfully desert him without reasonable cause. She also filed a cross bill asking for a divorce from defendant in error on the ground of extreme and repeated cruelty. The acts of cruelty are specifically alleged in the cross bill and are in substance, that for 5 years prior to 1912 she was in ill health and desired to go to California for the benefit of her health; that defendant in error refused to furnish her with necessary funds so to do, whereupon she borrowed the money from her father and went to California; that upon her return therefrom, defendant in error refused to receive her back or allow her to remain in the house as his wife and that he was guilty of conduct making her life unendurable; that on two separate occasions, defendant in error struck her without any provocation and caused

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her to fall on the floor, thereby suffering great pain.

Defendant in error answered the cross bill and denied that his wife was broken in health for five years prior to 1912, but admits that there were times when she was not well during that period; admits that he refused to furnish her with necessary means to go to California and denies that she wanted to go there for her health but states that she went to visit her sister; admits that she received financial aid to go to California from her parents over his protest; denies that he refused to receive her back as his wife and denies all the acts of cruelty. Two issues of fact were submitted to the jury, one upon the original bill and one upon the cross bill. The court directed the jury to find a verdict upon the issue presented by the cross bill, that defendant in

Gen. No. 5014. October Term, A. D. 1916. Ag. No. [illegible]

William A. Compton [illegible]

v.

[illegible]

Error to Circuit Court
McDonough County

Judgment [illegible]

William A. Compton [illegible]

error was not guilty of extreme and repeated cruelty, and submitted the issue upon the original bill of the willful desertion of the wife, plaintiff in error, to be determined by the jury from the evidence The jury found a verdict on this issue in favor of defendant in error. Thereupon the court entered a decree granting a divorce to defendant in error upon the original bill on the ground of desertion and dismissed the cross bill for want of equity.

The principal errors presented for review and relied upon for a reversal of the decree are, (1) the verdict of the jury on the issue tendered by the original bill is contrary to the evidence; (2) the court erred in directing the jury to find the issue upon the cross bill in favor of defendant in error; (3) the court erred in refusing to give certain instructions offered on behalf of plaintiff in error.

As to the first contention without attempting to detail the facts shown, it is only necessary to say that the evidence was sufficient to sustain the verdict of the jury upon the original bill.

From the evidence presented in this case the court did not err in directing the jury to find the issue under the cross bill

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in favor of defendant in error. What acts of cruelty will amount to a cause for divorce has been defined in one of the later decisions of the Supreme Court (Trenchard vs. Trenchard, 245 Ill. 313) as follows:

> "What is meant by cruelty as used in our statute, has been the subject of consideration by this court in many cases and has been construed to mean physical acts of violence; bodily harm such as endangers life and limb; such acts as raise a reasonable apprehension of bodily harm and show a state of personal danger incompatible with the marriage state. Bad temper, petulance of manner, rude language, want of civil attentions or angry or abusive words, are not sufficient grounds for divorce for extreme and repeated cruelty."

The two acts of physical cruelty relied upon to show extreme and repeated cruelty come far from being within the above rule. The first one happened while the parties were on a visit to New York in 1901, concerning which Mrs. Compton testified as follows:

> "The time in New York when he slapped me my sister and son were with me; I was getting breakfast and he was standing by ordering me and I told him I thought I could do that and he slapped me; he was angry when he slapped me; did not bruise me, but it smarted like everything for awhile;"

The matter was apparently treated by the parties

as a trivial affair for they lived together happily afterwards for many yaers and probably never would have thought of it again if the bill for divorce had not been filed. The act is denied by defendant in error, but if it ever did happen it was fully condoned by the future conduct of the parties. The second act of physical violence occured in April, 1910, in regard to which Mrs. Compton testified;

> "It was after I came from California, I tried to get the stick pin from him; he was in the dining room putting on the stick pin and I just grabbed it as he passed; I wasn't angry and don't think he was; it was done so quick I don't think we had time to get angry; that was the time he knocked me down; he just turned and hit me and I went down; I don't know yet whether he was angry; I grabbed his hand with the stick pin in it; he drew his hand back and I fell; don't think I screamed; I think our son heard me fall and came running down; he asked if Mr. Compton had knocked me down and he said no; I said why he did; my son started in on his father

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> and they had a tussle; then pretty soon they quit; I heard his father say, you are breaking my finger, this was the time Mr. Compton's finger was broken;"

Her testimony does not show that defendant in error intentionally struck her or purposely knocked her down and it might reasonably be inferred that she attempted to grab the stick pin from his hand, in drawing his hand back to prevent her doing so, it accidentally struck her, and she did not attempt to say that he acted in anger. The court did not err in directing the verdict upon the cross bill.

It is contended that the court erred in refusing to give instructions numbered 1, 2, 3, 4, 5, 6, and 8, offered on behalf of plaintiff in error. There was no evidence on which to base refused instruction 1. Refused instructions numbered, 2 and 4, state, among other things, that if defendant in error consented to his wife leaving him then the desertion was not willful and without reasonable cause. These instructions ignore the undisputed evidence that the day after plaintiff in error left her husband, he wrote her a letter requesting her in most earnest terms to return and a short time thereafter sent a mutual friend to make the same request of her. Consent to a separation may be withdrawn at any time within the two years. Albee vs. Albee, 141 Ill. 550. Refused instructions 5 and 6 call attention to particular facts in the case. Refused instruction 8 reters to the credibility of witnesses and refusal to give it was not reversable error in view of the other instrutcions given.

There being no reversable error in the record a decree is affirmed.

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Gen. No. 6615. October Term, A. D .1916. Ag. No. 34.

The People of the State of Illinois,
Defendant in Error.

vs.

Chris Jensen, Plaintiff in Error.

Error to County Court DeWitt County

Eldredge, J.

This is a writ of error to review the judgment of the County Court of DeWitt County wherein plaintiff in error was committed to the County jail for four months and to pay a fine of $100 for contempt of court. This proceeding was commenced by a petition filed by Amelia Jensen, the wife of plaintiff in error. The petition avers that Amelia Jensen is the mother of Dexter, Albert and Esther Jensen, aged respectively, eleven, eight and five years, and that plaintiff in error is the father of said children; that at the November Term, 1914, of said court, and order was entered that Chris Jensen, the father, pay the expenses of boarding said children at the McLean county school for girls at Bloomington, said expenses not to exceed $10 per month for each of said children; that on September 8, 1915, and order was entered in said court awarding the custody of said children to said petitioner but allowing said former order to remain in full force and effect except as to the change of the custody of the children; that said Chris Jensen has not paid any part of the amount except the sum of $19 and that he wholly refuses to pay any further part of said sum; that petitioner has had charge and control of said children since the date of said

(Page 1)

last order and has paid all the expenses of the care and keeping of said children; that on October 13, 1916, said Chris Jensen came to the home of the petitioner in Paxton, Illinois, and forcibly took said Dexter Jensen out of her possession without her consent and took said Dexter away with him and now has her in his charge and control at some place to petitioner unknown; that a rule may be entered by said court on said Chris Jensen to show cause why he should not be found guilty of contempt of said order of court by the failure to pay said sum as ordered by the court and for forcibly taking said child from the possession of said petitioner.

The petition is signed by Amelia Jensen and to it is attached the following jurant, "Subscribed and sworn to before me this 15th day of October, A. D. 1916. Edward B. Mitchell, Notary Public." (Seal.) Plaintiff in error filed an answer to the petition in which he states that there was no valid order of the court forbidding

him to take his own child to his home as charged in the petition; he is advised that Amelia Jensen, his wife, has paid the necessary expense of said children not paid by him and that such payments discharge the rule if any there was against him; that said child was taken to his home which is also the lawful home of said child and said Amelia Jensen; that the first order of the court if valid was vacated by the later order of the court awarding the custody of the children to his wife, and in effect awards the child to himself; that he is advised that the court is without jurisdiction to entertain these proceedings.

The court compelled plaintiff in error to answer certain written interrogatories in answer to which he stated his name was Christ Jensen, aged 34, residence Minonk. That after he was arrested he directed the child to be hidden, that he got the child in Paxton where Mrs. Jensen had taken her away from the school and brought her home on the train and that said child was glad to go home with him; that the means he used was to go down to Paxton and tell the child

to come and go home after she told him her mother had said to her, "I wish your darn dad would come and get you;" that he took her August, 13th.

The petition of Amelia Jensen and the answer thereto and the answers to the interrogatories by plaintiff in error is all the evidence heard by the court. What the nature of the proceedings was in which the order committing the child to the school for girls was entered, or what the order itself was, or to whom the plaintiff was to pay the money while the children were at said school do not appear. The order taking the children from the custody of the school and giving them to the mother was not shown. If the original order directed the plaintiff in error to pay a sum not exceeding $10 per month for the care of said children, yet what was actually charged for these expenses is not shown. Nothing is shown by the record in this case that the County Court had any jurisdiction to enter any of the orders mentioned. The evidence does not show that plaintiff in error had any notice of any order of the County Court giving the children into the care and custody of his wife. It is insisted by counsel for defendant in error, that the contempt is of a criminal nature. The commission of a criminal act infers a criminal intent. A person cannot be guilty of a criminal intent in the violation of an order of court of which he had no knowledge or notice. The record in this case is barren of the slightest evidence to support the order imposing the penalty of a fine and imprisonment upon the plaintiff in error for contempt of court and is therefor reversed and remanded.

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The court compelled plaintiff, in error to answer certain written interrogatories in answer to which he stated his name was Charles Jensen, aged 34, residence Minnock. That after he was [illegible] to deliver the child to be hidden, that he got the child in Fulton where Mrs. Jensen had taken her [illegible] and brought her home on the train on [illegible] child was glad to go home with him; that the mother [illegible] to go down to Fulton and get the child.

(Page 4)

[illegible]

[illegible]

The [illegible]

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Gen. No. 6618. October Term, A. D. 1916. Ag. No. 30.

W. H. Whitaker, Appellant

vs.

T. W. Ginger, Appellee.

Appeal from County Court Christian County

204 I.A. 632

Eldredge, J.

At the December Term, A. D. 1916, of the County Court of Christian County, judgment was entered by confession against appellee for the sum of $766.35 and $50 for attorney fees on a judgment note in the usual form bearing date September 8, 1915, for the principal sum of $749.15 with 7 per cent interest payable to the order of H. M. Monroe and signed by T. W. Ginger, the appellee. The note states upon its face, "Secured by chattel mortgage" and was endorsed by H. M. Monroe. The note was assigned by Monroe to appellant for value before maturity and the judgment was confessed in favor of appellant. Upon motion of appellee the judgment was opened up, and upon being granted leave to plead he filed a plea of general issue with notice of the defense that the entire principal of the note was for usury. The facts are undisputed and it is conceded by appellant that the defense would be good as between appellee and Monroe, the original payee, but it is contended, it cannot be interposed against appellant because the note was assigned to appellant for value before maturity and without notice and he was not attempting to foreclose the chattel mortgage.

The case was tried before the court without a jury and judgment entered in favor of appellee.

Section 1 of "An Act to regulate the assignment of notes secured by chattel mortgages etc.," Chapter 95, R. S. provides "That all notes secured by chattel mortgages state upon their

(Page 1)

face that they are so secured, and when assigned by the payee therein named, shall be subject to all defenses existing between the payee and the payor of said notes the same as if said notes were held by the payee named therein, and any chattel mortgage securing notes which do not state upon their face the fact of such security shall be absolutely void." The question in controversey is settled by the case of Hogan vs. Akin, 181 Ill. 448, where a construction of this statute was directly involved and in the opinion in that case it was held, "Under the law a chattel mortgage has never been assignable so as to vest the legal title in the assignee, and the mortgage is subject to defenses in the hands of

Gen. No. 66[illegible]. October Term, A. D. 1916. Ag. No. 30.

W. H. Whitaker, Appellant

vs.

T. W. Ginger, Appellee.

Appeal from County Court
Christian County

Eldridge, J.

At the December Term, A. D. 1915, of the [illegible] Court of Christian County, judgment was entered [illegible] confession against appellee for the sum of $[illegible] and $50 for attorney fees on a judgment note in the usual form bearing date September 9, 1915, for the principal sum of $[illegible].15 with 7 per cent interest payable to the order of H. M. Monroe, [illegible] by T. W. Ginger, the appellee. The note [illegible] upon its face, "Given in settlement [illegible]" and was endorsed by H. M. Monroe. The note was assigned by Monroe to appellant, [illegible] before maturity. The judgment was [illegible] in favor of appellant. Upon motion of appellee the judgment was opened up, and upon motion [illegible] placed be filed a plea of [illegible] with notice of the defense that the [illegible] plaintiff [illegible] usury. The [illegible] appellee [illegible] appellee [illegible] is [illegible] counsel [illegible] $5 [illegible] [illegible]

[illegible]

[illegible] and judgment [illegible]

[illegible]

[illegible]

such assignee. The note, however, could be transferred before maturity, so as to cut off defense, and the object of the act is to destroy the negotiability of the notes of tha class, so that, in case of assignment, the assignee would not have rights that the payee would not have."

By the endorsement on the note of the fact that it was secured by chattel mortgage, the assignee was notified that the note was subject to all the defenses that existed between the maker and the payee at the time of the assignment, and he is not a holder without notice of the defenses thereto.

The judgment is affirmed.

such assignee. The note, however, could be transferred before maturity, so as to cut off defense, and the object of the act is to destroy the negotiability of the notes of this class, so that, in case of assignment, the assignee would not have rights that the payee would not have."

By the endorsement on the note of the fact that it was secured by chattel mortgage, the assignee was notified that the note was subject to all the defenses that existed between the maker and the payee at the time of the assignment, and he is not a holder without notice of the defense, the etc.

The judgment is affirmed.

(Jan. 2)

4/10/17

2781

Gen. No. 6622. October Term, A. D. 1916. Ag. No. 33

Mary C. Gordin and Edward B. Gordin, Executors of the Estate of Hannah J. Martin, deceased, Appellees.

vs.

G. W. Karr, Executor of the estate of Josephus Martin, Deceased, Emma B. Collison, Mary E. Collison, Effie Ireland, Edna Duncan, Walter Karr, Charles Karr, Appellants.

Appeal from Circuit Court Ford County

Eldredge, J.

This suit was originated by a bill in chancery filed by Hannah J. Martin in her life time against Fred Collison and G. W. Karr as executors of the will of Josephus Martin, deceased, and certain children and grandchildren of the testator, the same being the devisees and heirs of the deceased, to set aside an ante-nuptial contract entered into by the said Hannah J. Martin (then Hannah J. Amm) and Josephus Martin, September 4th, 1894.

The original bill averred that Hannah J. Martin was married to Josephus Martin, September 5th, 1894 at Paxton, Illinois, and that after her engagement to Josephus Martin, and on the day before the marriage, she and Josephus entered into an ante-nuptial contract for the purpose of making suitable provision for her in the event she should survive him. The bill further averred in substance that Josephus represented to her that he was a man of some property but not of much wealth; that he desired to make provision for her in such amount according to his estate as would be consistent with the property owned by him and fair to her; that she relied upon the fair-

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ness of Josephus and believing in his representations that the provision made by the agreement was fair and just to her, she joined with him in its execution; that said representations were untrue and that said Josephus was, in fact, a man of great wealth owning farm lands in Illinois of the value of $100,000 and personal property of the value of $75000 of which she only learned after the marriage; that she was induced to sign the agreement by fraud and deceit and that the provisions therein contained were grossly disproportionate to the amount that she would have been entitled to by law and were grossly inadequate. The bill prayed that the

Gen. No. 6622. October Term, A. D. 1916. Ag. No. 33

Mary C. Gordin and Edward P. Gordin,
Executors of the Estate of Hannah J.
Martin, deceased, Appellees.

vs.

G. W. Karr, Executor of the estate of
Josephus Martin, Deceased, Emma B.
Gulliam, Mary L. Coleman, Effie Ireland,
Edna Duncan, Walter Karr, Charles
Karr. Appellants.

Appeal from Circuit Court
Ford County

Eldredge, J.

This suit was originated by a bill in chancery filed by Hannah J. Martin in her life-time against Fred Gordon and G. W. Karr as executors of the will of Josephus Martin, deceased, and certain children and grandchildren of the testator, the same being the devisees and heirs of the deceased, to set aside an ante-nuptial contract entered into by the said Hannah J. Martin (then Hannah J. Arron) and Josephus Martin, September 4th, 1894.

The original bill averred that Hannah J. Martin was married to Josephus Martin, September 5th, 1894 at Paxton, Illinois, and that, [illegible] her engagement to Josephus Martin and on the day before the marriage she and Josephus entered into an ante-nuptial contract for the purpose of [illegible] each [illegible] in the event she [illegible]. The bill further averred in substance that Josephus represented to her that he [illegible] that he desired [illegible] consider [illegible] property [illegible] upon the faith.

(Page 1)

[illegible]

and were wrongs [illegible]

agreement be set aside as invalid and that she be awarded her interest under the statute. Upon a hearing had upon the bill, answer, replication, and the master's report, a decree was entered from which an appeal was taken to the Supreme Court and the opinion rendered therein will be found in Martin vs. Collison, 266 Ill. 172. Reference is made to that opinion for a statement of the issues and facts as they then appeared. In that opinion it was held as follows:

> "Our conclusion is, that the evidence does not support the finding of the Chancellor that a confidential relation existed between the parties at the time the ante-nuptial agreement was executed, and it is therefor unnecessary to pass upon other questions raised and discussed in the pleas.
>
> The decree is reversed and cause remanded."

Upon the filing of the remanding order in the Circuit Court on January 14th, 1915, the defendants to the bill (appellants here) entered a motion for a decree dismissing the bill for want of equity in accordance with the opinion and findings of the Supreme Court, and the complainant entered a cross-motion to refer the cause again to the Master for further testimony. The defendant's motion was overruled, the cross-motion was allowed and the cause again referred to the Master to take additional testimony. The complainant, Hannah J. Martin, died June 2nd, 1915, and the defendants then filed a plea in abatement setting up that fact and averring that by reason thereof,

(Page 2)

the cause of action, if any, abated, which plea the court held to be insufficient. Leave was then granted to Mary C. Gordin and Edward B. Gordin, executors of the will of said Hannah J. Martin, deceased, to be substituted as complainants and to file an amended bill. The amended bill sets out the death of Hannah J. Martin and the appointment of the said executors of her will, and then avers that in July on August 1894, Hannah J. Martin (then Hannah J Amm) and Josephus Martin became engaged to be married and that by reason thereof the relations between them were of a confidential nature; that after the said engagement they entered into the ante-nuptial contract in question, and were afterwards married and lived together as hus-

agreement be set aside as invalid and that she be awarded her interest under the statute. Upon a hearing had upon the bill, answer, replication, and the master's report, a decree was entered from which an appeal was taken to the Supreme Court and the opinion rendered therein will be found in Martin vs. Collison, 266 Ill. 172. Reference is made to that opinion for a statement of the issues and facts as they then appeared. In that opinion it was held as follows:

"Our conclusion is, that the evidence does not support the finding of the Chancellor that a confidential relation existed between the parties at the time the ante-nuptial agreement was executed, and it is therefore unnecessary to pass upon other questions raised and discussed in the pleas.

The decree is reversed and cause remanded."

Upon the filing of the remanding order in the Circuit Court on January 15th, 1915, the defendants to the bill, appellants herein, moved for a decree dismissing the bill for want of equity in accordance with the opinion and mandate of the Supreme Court, and the complainant [illegible] to refer the cause again to the Master for further testimony. The defendant's motion was overruled, the cause was [illegible] allowed [illegible] the complainant [illegible] the [illegible] take additional testimony [illegible] Martin, died intestate [illegible] filed a plea in abatement [illegible] that [illegible] thereof.

[illegible]

[illegible]

mission, which [illegible]

Leave was [illegible]

R. Golden, [illegible]

[illegible]

band and wife until the death of Josephus on January 6th, 1908; that Josephus left a will which was duly probated and the said Hannah, the widow of the testator, renounced the provisions of the will in her favor; that at the time the ante-nuptial contract was entered into Josephus owned 1600 or 1700 acres of land worth $100,000 besides his homestead of the value of $3500; and that he also owned personal property of the value of $50,000; that the provisions made by the ante-nuptial contract for the intended wife were meagre and grossly disproportionate to the wealth of the said Josephus; that he did not make known to her the nature, amount or value of his property before the ante-nuptial contract was entered into and that she did not know nor was she so situated that she reasonably should have known the true facts in regard thereto and that said contract was fraudulent and void; that said Hannah became entitled to her widow's award and her rights in the real and personal estate of the deceased as such widow in accordance with the statute.

To the amended bill a demurrer was interposed on the ground that the cause of action abated on the death of Hannah and does not survive to her executors; that the right, if any, to have the ante-nuptial contract set aside was a personal right or privilege to said

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Hannah

which did not survive and could not be assigned or devised. The demurrer was overruled.

The defendants then answered the amended bill in which answer they admitted the death of Hannah but denied all the other averments of the bill, and alleged that the executors of the will of Hannah cannot maintain the suit because the right of action of Hannah, if any, had abated at her death and also that under the decision of the Supreme Court the complainants are not entitled to offer additional testimony and that no further proceedings should be had herein except to enter a decree dismissing the bill for want of equity. The answer also contains a general denial that the complainants are entitled to the relief prayed for or any part thereof.

The complainants excepted to that part of the answer to the effect that the cause of action abated and that the decision of the Supreme Court was **res adjudicata** and the bill should be dismissed for want of equity,

band and wife until the death of Josephus on January 6th, 1909; that Josephus left a will which was duly probated and the said Hannah, the widow of the testator, renounced the provisions of the will in her favour; that at the time the ante-nuptial contract was entered into Josephus owned 1600 or 1700 acres of land worth $10,000 besides his interest of the value of $[illegible]; and that he also owned personal property of the value of $20,000; that the provisions made by the ante-nuptial contract for the intended wife were meagre and grossly disproportionate to the wealth of the said Josephus; that he did not make known to her the nature, amount or value of his property before the ante-nuptial contract was entered into and that she did not know nor was she in situated that she reasonably should have known the true facts in regard thereto and that said contract was fraudulent and void; that said Hannah became entitled to her widow's award and her rights in the real and personal estate of the deceased as such widow in accordance with the statute.

To the amended bill a demurrer was interposed on the ground that the [illegible] or Hannah [illegible] the [illegible] if any, to have the ante-nuptial contract set aside was a personal right [illegible]

(Sec. 3)

[illegible]

which did not [illegible] and [illegible] wed. The demurrer was [illegible]

The defendant [illegible]

which answer the [illegible]

[illegible]

and the exceptions were sustained.

After taking additional testimony the Chancellor entered a decree in which he finds that the ante-nuptial contract was entered into **after** the parties were engaged to be married and that by reason thereof their relations at the time of the execution of said contract were of a confidential nature; that the provisions made for the intended wife were greatly disproportionate to the value of the property owned by Josephus; that the defendants have not proven by a preponderance of the evidence that the intended wife at the time of the execution of the contract, had full knowledge or reasonable means of knowledge of the nature, character and value of her intended husband's property, and that by reason of the failure to make such proof the contract is declared void and set aside; that said Hannah was sufficiently informed, or had an opportunity to be so informed, as to the nature, character and value of the real estate owned by Josephus when the contract in question was entered into; that upon the death of Hannah

the suit abated in so far as it sought to have her dower in the real estate allowed and set off, but that it did not abate as to her widow's award and her interest in the personal estate, and it was decreed that the contract be set aside and that the executors of the will of Hannah J. Martin should pay to her the widow's award and one third of the personal estate owned by the deceased at the time of her death.

Josephus Martin was a farmer in Champaign County and at the time the contract was entered into, owned about 1700 acres of land, part of which he farmed himself and rented the balance. He moved to the city of Paxton in 1883 and after that time he rented all of his farm land. He had been married previous to his marriage with Hannah, and at the time of the death of his first wife in March 1894, had five children all grown and married, except one. Hannah J. Martin had also been married before, and at the time of her marriage with Josephus was a widow with four adult children, all of whom were married except one. The marriage took place September 5th, 1894 and she was at that time 49 years of age and Josephus was 62 years old. At the time

and the exceptions were sustained.

After taking additional testimony the Chancellor entered a decree in which he finds that the ante-nuptial contract was entered into after the parties were engaged to be married and that by reason thereof their relations at the time of the execution of said contract were of a confidential nature; that the provisions made for the intended wife were greatly disproportionate to the value of the property owned by Josephus; that the defendants have not proven by a preponderance of the evidence that the intended wife at the time of the execution of the contract, had full knowledge or reasonable means of knowledge of the nature, character and value of her intended husband's property, and that by reason of the failure to make such proof the contract is declared void and it is added: that said Hannah was sufficiently informed, or had opportunity to have been informed, as to the extent, character, and value of the real estate owned by Josephus when the contract in question was entered into; that upon the death of Hannah,

(Page 4)

the

suit abated [illegible] the real estate allowed and set off her [illegible] abate as to her widow's award and [illegible] the personal estate, and [illegible] set aside and that [illegible] Martin should [illegible] third of the [illegible] the time of her death.

Josephus [illegible] about 1700 acres [illegible] self and [illegible] Dalton in 1[illegible]

of, and for a number of years prior to her marriage with Josephus, she was living on a farm consisting of 160 acres of land in which she had a life estate and she also had some personal property which including bank stock and cash amounted to over $11,000. The farm on which she was living at the time of her marriage, and in which she had a life estate, was located about 9 miles from the lands of appellant. There is very little proof that Josephus owned any personal property of any great value at the time of the execution of the ante-nuptial contract. Neither the Master nor the Chancellor made any finding as to the nature or value of the personal property owned by him at that time. The evidence tends to show that at about that time he had lost some money in speculations on the Board of Trade. There is no evidence that Josephus ever made any false statements to Mrs. Amm in regard to

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the extent of the property owned by him nor any evidence of any actual or intentional fraud in regard thereto on his part. Before his death he conveyed to several of his children and grandchildren about 1400 acres of his lands and Hannah joined with him in the deeds. These conveyances were made in 1902 and 1906. Hannah and her first husband, and Josephus and his first wife, were members of and attended the same church, lived and owned land in the same vicinity, and frequently visited with each other back and forth. Under these circumstances, in addition to the well known fact that in farming communities the amount of land owned by any one individual is generally common knowledge among his neighbors, makes it highly improbable that Hannah did not know substantially the amount of land owned by Josephus. The decree makes a finding that Hannah prior to the execution of the ante-nuptial contract, was sufficiently informed of the nature, character and value of the real estate owned by Josephus at that time or the circumstances were such that she had opportunity of being so informed .

The additional evidence introduced by appellees after the case was remanded, and by which it is sought to sustain the finding in the decree that Hannah and Josephus were engaged to be married prior to the execution of the ante-nuptial contract is in substance as follows: E. B. Gordin, who married a daughter of Han-

of, and for a number of years prior to her marriage with Josephus she was living on a farm consisting of 140 acres of land in which she had a life estate and she also had some personal property, which including live stock and cash amounted to over $11,060. The farm on which she was living at the time of her marriage, and in which she had a life estate, was located about 6 miles from the lands of appellant. There is very little proof that Josephus owned any personal property of any great value at the time of the execution of the antenuptial contract. Neither the Master nor the Chancellor made any finding as to the nature or value of the personal property owned by him at that time. The evidence tends to show that at about that time he had lost some money in speculations on the Board of Trade. There is [illegible] dence that Josephus ever paid over [illegible] Mrs. Anna [illegible]:

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[illegible] of the [illegible] ed by her [illegible] of the existence of [illegible] found in record the [illegible] no answer to [illegible] him in the deed [illegible] and 1915 [illegible] and his wife [illegible]

[illegible]

nah, testified that about the middle of July, 1894, Martin told him that he was going to marry Mrs. Amm. M .L. Funk, also a son-in-law of Hannah, testified that about the week before the marriage Martin told him that he and Mrs. Amm were going to get married. F. L. Wessland testified that he met Martin in town one day and told him he saw his horse down at some crossing about one half mile south of Mrs. Amm's farm and that Martin laughed and said it would not be long before he would be married. The witness could not fix the date when this conversation took place. Nancy Stephens, a daughter of Josephus, who resides in Chicago, testified that on about the middle

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of August 1894, her father called at her home and told her that he was going to be married and that he wanted to speak to her about it; that he had talked to the rest of the children and they were all satisfied and he hoped she would feel all right about it; he said that it would not improverish his children as he had it fixed with her; that it was Mrs. Amm whom he was going to marry; that he had arranged the property matters so that it would not impoverish any of the children. A Mrs. Cooper testified that she was riding on a train going to Kankakee and that Martin was also on the train and he came to her and asked her if she would hold a couple of sticks while he pulled; that if he got the short one he would be married in September and if he didn't he would have to wait until she got ready; she could not tell who pulled the sticks; that he went into the back part of the train and brought Mrs. Amm forward; there was no talk there about what was being done; Martin said he was going to marry Mrs. Amm; witness could not fix the time when this took place.

Appellants insist that Hannah Martin having died her children as her heirs became directly interested in the litigation and incompetent as witnesses, and that the witness Gordin, the husband of one of her daughters, and Wessland, the husband of another likewise became incompetent to testify. The testimony of these two witnesses was taken before Mrs. Martin died but after her death appellants made a motion to exclude it on the grounds stated above which the court refused to do. Without passing upon this question it is sufficient to say

but even if these witnesses were competent to testify under the circumstances, their testimony does not tend to show that an agreement existed between Martin and Mrs. Anna prior to the execution of the contract. Neither one of them testified that Martin said that he was engaged to or had asked Mrs. Anna [illegible]. In Martin vs. Collins supra, in holding that the evidence did not show that a marriage agreement was entered into to between the

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parties before the antenuptial contract was executed, commented upon the testimony given by one of the witnesses on this point, reciting as follows: "The witness testified Martin directly told him a number of times about marrying the appellee and said he had taken her on a ride; he did not testify to Martin making statement that he was engaged or had agreed to marry [illegible]." The [illegible] ceeding is pertinent in this [illegible] witness [illegible] Goodin, Woodard, Mrs. [illegible] and [illegible] Stephens. The evidence further [illegible] Mrs. Gray [illegible] said [illegible] and that Nancy Stephens [illegible] visiting [illegible] [illegible] [illegible] to be married [illegible] [illegible] nuptial contract [illegible] [illegible] not introduced [illegible] [illegible]

4/16/17

2782

Gen. No. 6628. October Term, A. D. 1916. Ag. No. 39.

Harley E. Shride, Appellant,

vs.

Estate of Wm. P. Abraham, Appellee.

204 I.A. 634

Appeal from Circuit Court Shelby County.

Eldredge, J.

This is an appeal from the judgment of the Circuit Court of Shelby County rendered in that court on an appeal thereto from the Probate Court of said county, involving a claim of appellant for a one-fourth part of certain chattel property of his mother's (Sarah A. Abraham's) estate alleged to have been appropriated by Wm. P. Abraham, her husband, and never administered upon nor accounted for by said Wm. P. Abraham as executor of her estate. Wm. P. Abraham died in 1914 and this claim is filed against his estate. The amount of the claim is $800 including interest. The claim was disallowed in the Probate and Circuit Courts.

Harley E. Shride, appellant, was the youngest child of Jacob C. Shride and Sarah A. Shride and was a minor until just before the date of the filing of the claim in question in the Probate Court. Jacob C. Shride, now deceased, died in 1901, testate, and by his will gave to his widow all his personal property and devised to her 80 acres of land as long as she remained his widow and 40 acres of land in fee and appointed her the executrix of his will. The land was subsequently sold to pay debts and the estate was settled. Sarah A. Shride, the widow of Jacob,

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married Wm. P. Abraham in 1904 at which time she possessed personal property consisting of corn, hay, horses, cattle, hogs, household goods, etc. amounting in value to between $2500 and $3000, and also about $2500 in cash, being the balance of the sum realized from the sale of the real estate after the payment of the debts of her first husband's estate. When she married Abraham the farm chattel property was moved to Abraham's farm and the live stock mentioned was mingled with the live stock owned by Abraham and the grain and hay were mingled with that of Abraham and was fed to the live stock on the farm and sold and the live stock was sold by Abraham and his wife during her life time. The evidence shows that all the farm chattel property owned by Sarah A. Abraham at the time of her marriage to Wm. P. Abraham was mingled with that of her husband and was used and sold by them as one common property.

her death had the $2500 in cash, no part of which represented the value of proceeds of the farm chattel property mentioned. She died testate, the provisions of her will being as follows:

> "I Sarah Alice Abraham, of the age of forty-five years feeble in body but sound of mind and memory do hereby make the following my last Will and testament without any influence or suggestion on the part of any one interested or uninterested now or hereafter in this my will, to-wit:—
>
> 1st: I give to my husband Wm. P. Abraham six hundred dollars as my token of love and affection and help I received untiring, for doctoring and nursing through my long and severe sickness.
>
> 2nd: I give to my daughter Ora Bell Tolly and Thomas Edward Shride, my son, and Louis Maud Giles my daughter and Harley Ellsworth Shride my son, the balance of my estate consisting of nineteen hundred dollars to be divided share and share with my sons and daughters.
>
> 3rd: I appoint my husband, Wm. P. Abraham executor of this my will revoking all former will made by me."

Wm. P. Abraham as executor of his wife's will did not inventory any of the chattel property removed by his wife to his farm at the time of her marriage to him. The contention now is that

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said chattel property or the value thereof, notwithstanding that it was used, sold or otherwise disposed of during the lifetime of his wife, should have been accounted for by him as such executor as a part of her estate.

This chattel property as before stated consisting mostly of live stock and grain was intermingled, used and sold with the property of the husband and so used and sold by either him or his wife in and about the business of the farm and for the support of the family with the wife's knowledge and acquiesence. It is apparent from the terms of the will of Sarah A. Abraham that she no longer considered it as her undivided property and made no attempt to dispose of it therein. The money disposed of by the will was what she received from the sale of the real estate over and above the amount necessary for the payment of the debts of the estate of her first husband. It was held in the case of Reed vs. Reed, 135 Ill. 482.

> "If a husband receives the capital fund of his wife's separate property, there is no presumption that she intended to give or transfer it to him * * * * but if the husband uses the property in his business or for the support of his family, with her knowledge and assent, a gift may be inferred in the absence of a contrary agreement."

In the case of Duval vs. Duval, 153 Ill. 49, the court

[illegible] and the [illegible] of which [illegible]
[illegible] the value [illegible] of the farm [illegible]
[illegible] d. She [illegible] the provisions of [illegible]
ill being as follows:

"I Sarah Jane [illegible] of the [illegible]
[illegible] in [illegible]
[illegible] and [illegible]
[illegible] will and testament [illegible]
[illegible] or [illegible]
interested or [illegible]
this my will to-wit:

[illegible] I give to my beloved [illegible]
[illegible] six hundred dollars [illegible]
[illegible] and help [illegible]
[illegible] and nurse [illegible]
[illegible] sickness.

[illegible] I give to my [illegible]
Tally and Thomas [illegible]
Louis [illegible]
worth Smith [illegible]
[illegible] of [illegible]
divided share [illegible]
[illegible]
water.

[illegible]
been [illegible]
[illegible] made [illegible]

Wm. [illegible]
[illegible]

said:

> "The proof shows that the proceeds of the sales of the property went into the hands of Thomas C. Duval, without objection from his wife; and the moneys were used in his business and in the support of his family with her consent. There is nothing in the evidence to show that the relation of principal and agent existed between Mrs. Duval and her husband, or that she regarded him as her agent. She never objected to the fact that the Samuelson notes were payable to his order, or to his collection of whatever principal and interest was paid thereon. If the husband uses the capital fund of his wife's separate property in his business, or for the support of his family, with her knowledge and assent, a gift may be inferred in the absence of a contrary argument. (Reed vs Reed, 135 Ill., 428)" The same rule was annuonced in Kahn vs. Wood, 82 Ill., 219 and Hawk vs. Van Ingen, 196 Ill., 20.

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The record is barren of any facts tending to show either expressly or impliedly that said chattel property was held in trust by Wm. P. Abraham for his wife. The evidence shows the claim to be without merit and the judgment is affirmed.

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Gen. No. 6631. October Term, A. D. 1916. Ag. No. 42

Nicholas Berns, Appelant,

vs.

Oscar S. Perry, Appellee.

Appeal from Circuit Court Shelby County

204 I.A. 635

Eldredge, J.

On or about February 12th, 1914, Nicholas Berns, appellant, had a sale of certain personal property on his farm in Shelby County. Charles H. Perry is the son of appellee, Oscar S. Perry and bid in certain property at the sale. As part payment on the amount of the property so bid in by him, he offered to give his note with his father, appellee, as surety. The notes given by the purchasers at the sale were made payable to the Farmer's Bank of Ohlman. The cashier of the bank, H. A. Houseman, was present at the sale and acted as clerk. Houseman prepared the note for said Charles H. Perry who took it away for the purpose of obtaining his father's signature to it and brought it back to Houseman purporting to be properly executed by the son and his father. The note was for the principal sum of $260.50, bore interest at the rate of 6 per cent per annum and was payable to the order of said bank ten months after date. The note also contained a provision that the makers thereof "Agree to pay all costs of collection of the same, including a reasonable attorney's fee to be entered as part of any judgment rendered on this instrument." The note was subsequently assigned to appellant by the bank. Appellant brought his action of assupmsit against Oscar S. Perry and Charles H. Perry to recover the amount of the note and interest. No service was obtained upon the son, Charles H. Perry and the case proceeded

(Page 1)

against appellee alone. Appellee filed a verified plea denying the execution of the note. Two trials have been had and on each a verdict has been rendered finding the issues joined in favor of appellee.

It is conceded by counsel for appellant that the evidence on the issue of whether the name O. S. Perry on the note was the genuine signature of appellee or whether it was a forgery is so conflicting that the verdict of the jury is conclusive upon that question, but it is insisted that the evidence of appellee alone shows conclusively as a matter of law that it was subsequently ratified by him. The testimony of appellee referred to is substantially as follows:

"I first knew that my name was on this note along about harvest time in 1915. I knew

that my name was on this note before I went to Mr. Bern's house * * * * Some time about the 12th of June, I cannot remember the date, I think it was over there at Charley's I went in at the gate; there was a mail box out at the gate; as I went into the gate his mail box was there, and he got a letter from Ohlman, and I believe I opened it and I seen the statement there, and I says, who is on the note, and he says I signed your name to that note * * * * I heard the testimony of Nicholas Berns and remember having a conversation with him at his house in August, 1915. I had a conversation with him there. I spoke to Mr. Berns with reference to the note over at the bank. I told him that I wished that he would go over at the bank. I told about that note, that I wasn't acquainted with them, that the boy had threshed his wheat and he didn't have money enough to go around and that I did not, that I couldn't pay that debt and that I would see that he kept the interest paid up; Mr. Berns said that was all they wanted; that was about all that was said."

There was another conversation which took place in the home of appellee between himself, Houseman and appellant in October 1915, but as the different versions of that conversation between the parties are conflicting we must hold that the jury adopted that which was testified to by appellee.

The sole question presented for our consideration is whether the testimony of appellee above quoted established as a matter of law a ratification of his signature of the note. In

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many jurisdictions a forged instrument cannot be ratified, first, because it is a anulity and there can be no ratification of that which does not exist; and second, forgery being a crime, public policy forbids the ratification of the criminal act. In this state however it has been uniformly held that a forged instrument may be ratified either directly or by implication under certain circumstances. One can only be held to have made such a ratification when it is shown that he did so with full knowledge of all the material facts. Fay vs. Slaughter, 194 Ill. 157; Chicago Edison Co. vs. Fay, 164 Ill. 323; Heffner vs. Vandolah, 57 Ill. 520; Livings vs. Wiler, 32 Ill. 387. It will never be implied from a doubtful state of facts. Chicago Edison Co. vs. Fay, **supra;** Bulger vs. Gleason, 123 Ill. App. 42; Gleason vs. Henry, 71 Ill. 109. It is apparent that appellee in his conversation with appellant did note promis to qay the note at any time, nor acknowledge the signature to be his, but in fact stated that he could not pay the debt. There is no evidence in the record that appellee knew the amount of the principal of the note, the rate of interest, the provision in regard to attorney's

fees nor any of the conditions of the note except that his name was supposed to be signed thereto. It is urged however that it was his duty to inform Berns at that time what purported to be his signature on the note was a forgery, and that having kept silent when he should have spoken, he is now estopped from denying the validity of the note. While it is true that a ratification may be implied from mere silence where the law required the party concerned to speak, yet this rule can only be invoked when the other party has been mislead thereby and induced to do an act which he would not otherwise have done, or omits to do an act he would have done but for the conduct of such party and injury results therefrom. The doctrine of estopple **in pais** is to prevent injuries arising from conduct or declarations which have been acted on in good faith and which would

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be inequitable to permit the party to retract. In order to create such an estopple the party estopped must have induced the other party to occupy a position which he would not have occupied but for such acts and declaration and which also must be such as would ordinarily lead to the result complained of. Hefner vs. Vandolah **supra.** The evidence does not show, and there is no contention made, that appellant was induced to do any act which he would not otherwise have done, or omited to do any act which he would have done, by the conduct of appellee, or that appellee's silence caused any loss or injury to appellant. Appellant is in no different position whatever than he would have been had appellee immediately told him that his signature on the note was a forgery.

No other errors are presented for our consideration and the judgment is therefor affirmed.

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Gen. No. 6638. October Term, A. D. 1916. Ag. No. 48

William T. Ross, Appellant,

vs.

Estate of James H. Ross, deceased, Appellee.

Appeal from Circuit Court, Adams County

Eldredge, J.

William T. Ross, the appellant, filed a claim against the estate of his father, James H. Ross, deceased, in the County Court of Adams County for the sum of $626 for lodging, board and nursing of the deceased during his life time. The claim was disallowed in the County Court and an appeal was taken to the Circuit Court, where upon a trial, at the close of the evidence introduced by appellant, the court excluded the evidence upon the motion of appellee and directed the jury to find the issues joined in favor of appellee. Upon the verdict so found, judgment was rendered, to reverse which the appeal to this court is prosecuted.

James H. Ross, the deceased, died intestate, April 10th, 1915. The claim of appellant is for board, room and washing for his father from April 10th, 1910 to September 1st, 1912, and from June 27th, 1914 to December 24th, 1914 at $4 per week, and for nursing the deceased from October 14th, 1914 to December 24th, 1914, at $2 per week, making the total of $626 James H. Ross in his life time was a farmer and in 1907 being left alone on the farm by the death of his wife, rented his farm and went to reside with appellant. From that time until his death he lived a part of the time with appellant and a part of the time at the homes of his

other children. On December 24th, 1914, he was, upon inquest, declared to be a distracetd person and a conservator was appointed.

There is no contention that there was any express contract between appellant and his father for the payment of the latter's board and lodging but it is claimed that there was some evidence tending to show an implied contract for such paymentt and that the cour therefor erred in directing the jury to find its verdict in favor of appellee. During all the time mentioned, appellant was indebted to his father and on May 10th, 1909 evidenced the indebtedness by executing his promissory note payable to the order of his father for $1095. A part of this note was paid and new note was given, November 20th, 1913, for $900. The evidence further shows that during this period of time appellant used more or less of the crops raised on his father's farm. Nelson

Gen. No. 6638. October Term, A. D. 1916. Ap. No. [illegible]

William T. Ross, Appellant,

vs.

Estate of James H. Ross, deceased, Appellee.

Appeal from Circuit Court of Adams County

Eldredge, J.

William T. Ross, the appellant, filed a claim against the estate of his father, James H. Ross, deceased, in the County Court of Adams County for the sum of [illegible] for lodging, board and nursing of the deceased during his life time. The claim was disallowed in the County Court and an appeal was taken to the Circuit Court, where upon a trial, at the close of the evidence introduced by appellant, the court excluded the evidence upon the motion of appellee and directed the jury to find the issues joined in favor of appellee. Upon the verdict so found judgment was rendered, to reverse which this appeal to this court is prosecuted.

James H. Ross, the deceased, died intestate April 10th, 1916. The claim of appellant is for board, room and washing for his father from April [illegible], 1910 to [illegible] 1912, [illegible] October 27th, 1914 at [illegible] per week and [illegible] deceased from October [illegible], 1914 to [illegible] 1914, at [illegible] per week [illegible] H. Ross in his life time [illegible] left alone on the farm [illegible] his farm and went to live with appellant [illegible] time until his death [illegible] appellant and a part of the time [illegible]

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other children. [illegible]

[illegible]

The [illegible]

[illegible]

part of the time [illegible]

[illegible] 1913, [illegible]

[illegible]

Ross, son of appellant, testified that his mother became sick and was taken to a hospital in September, 1914, and about that time his grandfather told him in substance, that they were having bad luck, that he was boarding there off of then and he did not want to sponge off of anybody and that he always intended to pay for his board and lodging. Laura Ross testified to substantially the same facts. The witness, Calkins, testified that James H. Ross told him in 1911, that he generally paid his board wherever he stayed and that he never sponged off of anybody. George Tate testified that in 1912, in a conversation with James H. Ross, he remarked that it made it nice to have children to go to live with, and the latter replied, "Yes, but I intend to pay my way as I go." George Stillwell testified that James H. Ross told him in 1912, that he did not mean to sponge off of his children, that he paid his board where he was at. J. L. Miller testified that he is the cashier of the State Bank of West Point and James H. Ross gave him the note for $1095 to collect from appellant and told him at the time he could waive the interest.

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Appellant paid $100 on the note and gave the new note for $900. He further testified that a few days thereafter, James H. Ross came to the bank and he told him, "Now these people are not satisfied with your settlement; I think they have paid you up absolutely all the money that your note shows to be due from them; now then you give me a check for $100 which they paid you in excess of what you asked of them and let me make complete settlement over the matter between you." That Mr. Ross replied, "I stayed down there, I will settle that myself, settle any claim they may have." Gearge Simmermacher testified that the day after the inquest he was at the home of appellant and in a conversation had between himself, appellant and his father, the subject of how long the father had lived with appellant was discussed and the father stated that he had lived with William 300 weeks and that he owed him for it. George Hartman testified that in March, 1915, which was after the conservator had been appointed, he went to the home of appellant to see him about some business and while there he had a conversation with appellant's father in which the latter told him that he owed appellant in the neighborhood of $1200 and it was bothering him; that he would like to pay it but his hands were tied and he could not do it. The court sustained a motion to exclude all the evidence

of the witness Hartman on the ground that it was an admission made by a distracted person after inquest found and conservator appointed, and was therefor incompetent.

If there was any evidence in the record from which standing alone, the jury could, without acting undeasonable in the eye of the law find that there was an understanding or agreement between appellant and his father, that the latter should pay for his board and lodging, then the court should have permitted the cause to be submitted to the jury. Libby, McNeill and Libby vs. Cook, 222 Ill. 206. The jury should have been allowed to pass

upon the fact if, from an examination of the evidence admitted, it could not be said that there was no evidence or but a scintilla of evidence tending to prove appellant's claim. The evidence of the witness Simmermacher alone was sufficient for this purpose. The court considered the testimony of the witness Hartman incompetent on the ground that it related to a conversation had with Mr. Ross the day after he had been found to be distracted by the inquest. It seems to be conceded that the deceased was found to be a distracted person, although the proceedings in the County Court, which it is claimed resulted in the appointment of the conservator were not introduced in evidence. A witness is not rendered incompetent to testify merely because he has been found to be a distracted person and incapable of transacting his business affairs, neither would the admissions of such a person be incompetent for the reason. Champion vs. McCarthy, 228 Ill. 87. Even if a witness is insane, if such mental dearangement does not affect the subject matter of the testimony either at the time of testifying or at the time of the occurence, he is not incompt-ent. But in any event where an objection is made as to the competency of a witness to testify on account of his mental condition, the objection must be made before he has given any testimony, and it is for the court to decide upon the competency of the witness to testify, and the evidence in regard thereto should not in the first instance be taken in the presence of the jury. People vs. Enright, 256 Ill. 221. Of course, the same rule must apply where admissions made by such distracted or insane person are sought to be introduced.

For the errors indicated the judgment must be reversed and the cause remanded.

of the witness Hartman on the ground that it was an admission made by an interested person after that [illegible] found and conservator appointed, and was therefore incompetent.

If there was any evidence in the record from which, standing alone, the jury could, without acting unreasonable in the eye of the law, find that there was an understanding or agreement between appellant and his father that the latter should pay for his board and lodging, the the court should have permitted the cause to be submitted to the jury. Libby, McNeill and Libby vs. Cook, 222 Ill. 206. The jury should have been allowed to pass

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upon the fact if, from an examination of the evidence admitted it could not be said that there was no evidence or a scintilla of evidence tending to prove such [illegible] The evidence of the witness Simmons alone was not sufficient for this purpose. The court considered the testimony of the witness Hartman incompetent on the ground that it related to a conversation had with Ross the day after he had been found to be insane by the inquest. It [illegible] be [illegible] that the deceased was found to be a distracted [illegible] proceedings in the county court [illegible] sulted in the appointment [illegible] introduced in evidence. A [illegible] competent to testify [illegible] to the [illegible] of the [illegible] [illegible] McCarthy [illegible] Ill. [illegible] such mental [illegible] matter [illegible] mental [illegible] has given [illegible] the evidence [illegible]

For the [illegible] versed and [illegible]

(Page [illegible])

Gen. No. 6642. October Term, A. D. 1916. Ag. No. 87.

Thomas D. Smith, Appellant,

vs.

Thomas Freeman and Martha Freeman, Appellees.

Appeal from Circuit Court Vermilion County.

Eldredge, J.

Appellant sued appellees in an action on the case to recover damages for personal injuries received by him while working as a carpenter in the building of a porch for them. The declaration consists of one count in which it is charged in substance, that appellant on the 14th day of July, 1912, was employed by the defendants as a carpenter; that it was a duty of the defendants to furnish him with a reasonable safe place to work; that the defendants, not regarding their duty, furnished him a certain scaffold upon which he was directed to work by them and which scaffold was insufficient and not reasonably safe and while he was in the exercise of due care, said scaffold broke whereby he fell to the ground and was injured.

The evidence shows that the premises were owned by appellee Martha Freeman and that in the construction of the porch it was necessary to erect a scaffold on which to stand. This was done by nailing boards across two upright timbers. One of these boards appears to have been defective and broke while the plaintiff was standing thereon causing him to fall to the ground and to be somewhat injured. Thomas Freeman was the husband of Martha Freeman and was assisting appellant more or less in and about his work. Appellant testified that the board which broke had a knot in it and that Thomas Freeman had charge of the construction of the scaffold and he himself

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had no knowledge that the board was defective. The testimony of Thomas Freeman was to the effect that appellant himself made the scaffold and that all he, Freeman, did was to hold the two upright pieces which appellant nailed the cross pieces thereon. The evidence for appellees further tends to show that appellant was employed by Martha Freeman and that Thomas Freeman, her husband, who was seventy-five years of age, was simply assisting him in an incidental way and at the time of the injury was holding a board while appellant was standing on the scaffold nailing it to the frame of the porch. From the verdict rendered, the jury evidently found, either, that appellant constructed the scaffold himself or had full know-

Gen. No. 6172. October Term, A. D. 1916. Ag. No. 67.

Thomas D. Smith,

Appellant.

vs.

Thomas Freeman and Lydia Freeman,

Appellee.

Appeal from Circuit Court Vermilion County.

Affirmed.

Appellant and appellee [illegible] action [illegible] recover damages for personal injuries [illegible] while working as a car inspector in the employ of [illegible] for trial. The declaration consists of one count [illegible] which it is charged in substance, that on the [illegible] day of July, 1915, [illegible] a car inspector, that it was [illegible] furnish him with a reasonable [illegible] the defendants, [illegible] a certain section [illegible] by them and which [illegible] reasonably safe and well [illegible] car, said section [illegible] and was injured.

The evidence [illegible]

ledge of its construction and condition before he went upon it and we can see no reason for disturbing this finding.

Some of the instructions are criticized, but taking them as a series the jury were fairly instructed as to the law and there were no errors in the giving of the instructions nor in the rulings on the admission of evidence of sufficient gravity to cause a reversal of the judgment and it must therefore be affirmed.

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Gen. No. 6643. October Term, A. D. 1916. Ag. No. 51.

George B. Jones, Appellee,

vs.

William F. Gaumer, Appellant.

Appeal from Circuit Court
Edgar County

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Eldredge, J.

Appellee recovered a judgment for the sum of $2,250 in an action of assumpsit against appellant for damages resulting from a breach of contract for the exchange of real estate. Appellant in his argument has presented for our consideration but one of the errors assigned on the record, viz., that the verdict is contrary to the evidence. The evidence for appellee tended to show that he and appellant owned jointly about 790 acres of land in Mississippe, subject to a mortgage of $11000 and accrued interest amounting in all to about $12000; and that in February, 1912 they made a verbal agreement whereby appellee was to deed his undivided half interest in the Mississippi farm to appellant, or to a grantee designated by him, in consideration for which, appellant was to deed or cause to be deeded 80 acres of land, subject to a mortgage of $2000, located in Green county, Indiana; that the deeds were prepared by or under the direction of appellant; that appellee executed his deed to his undivided half of the Mississippi farm to a grantee named therein, E. L. Scott; that at the same time appellant caused a deed to be delivered to appellee to the said 80 acre tract of land in Indiana subject to two mortgages each for $2000; that appellee did not discover that the deed was subject to the second $2000 mortgage until some time there after; after the discovery that his deed to the 80 acre tract of land was subject to two mortgages of $2000 each instead of one, he complained to appellant about the matter and the latter

(Page 1)

thereupon signed a written agreement to furnish a deed for 120 acres of land in Green county, Indiana, subject to a mortgage of $450 and in case he could not get a deed for this land, to convey to appellee, 120 acres of as good land in said county. The testimony of appellant was to the effect that the trade was made between appellee and Scott and that he had nothing whatever to do with it; that he intended to convey the 120 acre tract to appellee as a mere gratuity and that said agreement was without consideration. This position is so unreasonable that we can not give it credence but believe that the written agreement strongly corroborates the fact that the contract was made by ap-

Term, No. 6573. October Term, A. D. 1916. Ag. No. 51.

James H. [illegible], Appellee,

v.

William C. Gramer, Appellant.

Appeal from Circuit Court
Edgar County

Hitchcock, J.

[illegible]

pellee with appellant. Also as strongly corroborating the testimony of appellee that the 80 acre tract was to be subject to but one $2000 mortgage is the evidence that the equity of appellee in the Mississippi farm was worth about $5850, while the value of the 80 acre tract of Indiana land after deducting $4000, the amount of the two mortgages thereon, was but about $800. This shows such a disparity of value between the two tracts that it is unreasonable to presume that appellee would have made the trade had he known of the second $2000 mortgage. In any event, however, the question at issue was purely one of fact within the province of the jury to determine, and as there is ample evidence to sustain the verdict the judgment will not be disturbed.

The judgment is affirmed.

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[illegible] with [illegible] [illegible] as strongly corroborating the testimony of appellee that the 50 acre tract was to be subject to but one $2000 mortgage is the evidence that the equity of appellee in the Mississippi farm was worth about $7500, while the value of the 50 acre tract of Indiana land after deducting $1000, the amount of the two mortgages thereon, was but about $800. This shows such a disparity of value between the two tracts that it is unreasonable to presume that appellee would have made the trade had he known of the second $2000 mortgage. In any event, however, the question at issue was purely one of fact within the province of the jury to determine, and as there is ample evidence to sustain the verdict the judgment will not be disturbed.

The judgment is affirmed.

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